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## Articles

### GOING FOR THE GOLD: THE REPRESENTATION OF OLYMPIC ATHLETES

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#### I. INTRODUCTION

The International Olympic Committee (IOC)<sup>1</sup> recently amended its rules regarding "amateur" status, thereby allowing

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\*\* B.A., high honors, 1993, Douglass College, Rutgers University; J.D. 1996, Villanova University School of Law. Miss Affrunti would like to express her appreciation to Mrs. Keller-Smith for the opportunity to co-author this Article and to her co-editors on the *Villanova Sports & Entertainment Law Journal* for their tremendous support and helpful critiques during the drafting of this Article.

1. The IOC was created in 1894 and was entrusted with the "control and development of the Modern Olympic Games." PUBLIC INFORMATION AND MEDIA RELATIONS DIVISIONS, UNITED STATES OLYMPIC COMMITTEE, 1995 FACT BOOK 18 (J. Michael Wilson ed., 1995) [hereinafter 1995 FACT BOOK]. The IOC governs the International Sports Federations (IFs) for each competitive sport and the National Olympic Committees (NOCs) from each participating country. *Id.* Every organization connected to the Olympic Movement must "accept the authority of the IOC and agree to be bound by the rules of the IOC." ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF SPORTS INDUSTRIES, VOLUME II - COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS, xiv-xv (1986). The aims of the IOC are to:

- Encourage the coordination, organization and development of sport and sports competitions;
- Collaborate with the competent public or private organizations and authorities in the endeavor to place sport at the service of humanity;
- Ensure the regular celebration of the Olympic Games;
- Fight against any form of discrimination affecting the Olympic Movement;
- Support and encourage the promotion of sports ethics;
- Dedicate its efforts to ensuring that in sports the spirit of fair play prevails and violence is banned;
- Lead the fight against doping in sport;
- Take measures the goal of which is to prevent endangering the health of athletes;
- Oppose any political or commercial abuse of sport and athletes;
- See to it that the Olympic Games are held in conditions which demonstrate a responsible concern for environmental issues;
- Support the International Olympic Academy;

"professional" athletes to compete in Olympic competition.<sup>2</sup> The IOC rule change allows each International Federation (IF) and National Governing Body (NGB)<sup>3</sup> to establish its own rules regarding "professional" athlete participation in national and international competitions, provided that the IF and NGB rules are not more expansive than those of the IOC.<sup>4</sup> The amended IOC rule has resulted in the elimination of the strict "amateur" competition that many individuals have come to associate with the Olympic Games<sup>5</sup>

- Support other institutions which devote themselves to Olympic education.

1995 FACT BOOK, *supra*, at 18.

For a discussion of the purpose of the IFs, see *infra* note 3. For a listing of the 196 currently recognized NOCs, see 1995 FACT BOOK, *supra*, at 21. For an interesting political and legal analysis of the Olympic Movement, within which these organizations are a part, see JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 25-31 (1988).

2. This rule change occurred when the International Olympic Committee, absolving its commitment to "pure" amateurism, declared that "eligibility to take part in the Games must be determined by [the] individual international federations." CHRISTOPHER R. HILL, OLYMPIC POLITICS 240 (1992). This change in eligibility was inevitable in light of increased commercialism and professionalism in sports. HOWARD L. NIXON II, SPORT AND THE AMERICAN DREAM 146 (1984). If the Olympic ideal of "amateurism" continued to be defined as it was in the past, there would be very few athletes with the financial support to compete. *Id.* Cf. KENNETH L. SHROPSHIRE, AGENTS OF OPPORTUNITY: SPORTS AGENTS AND CORRUPTION IN COLLEGIATE SPORTS 57 (1990) (noting Avery Brundage, former United States Olympic Committee (USOC) and IOC President, vehemently opposed rule change). For a further discussion of the impact of this rule change, see *infra* notes 30-60 and accompanying text.

3. The IFs and the NGBs are organizations set up to operate their sports on the international and national levels. See 1995 FACT BOOK, *supra* note 1, at 22. The IFs and the NGBs are responsible for establishing the guidelines for eligibility, as well as the rules for competition. *Id.* Specifically, the IFs are responsible for the international governance of their respective sports. *Id.* Working together with the NOCs and the IOC, the IFs conduct the sport events in the Olympic Games. *Id.* With only a few exceptions, a single IF governs each Olympic sport, its competition events and rules, and its eligibility rules. See *id.* (noting exception of one IF governing both speed and figure skating and one IF governing both biathlon and modern pentathlon sports). The NGBs, on the other hand, are organizations recognized by the IFs. See *id.* at 23. Each country participating in a sport has a single NGB with membership open to all athletes in its country. *Id.* The NGBs are primarily responsible for sanctioning competitions and establishing competition rules in their respective sports. *Id.*

For a further discussion of the IF and NGB operations, see *id.* (including discussion of how sports are selected for Olympic Games). For a list of recognized IFs, see *infra* note 34.

4. OLYMPIC CHARTER R. 26. For a discussion of the impact of this change, see *infra* notes 30-60, and accompanying text.

5. Although the rule change occurred in 1987, the 1992 Olympic Games, held in Lillehammer, were the first to truly experience its effect. Cf. BERRY & WONG, *supra* note 1, at xiv-xv (noting IOC allowed professional athletes to compete only in Soccer, Tennis, Hockey and Equestrian sports during 1988 Games). These Olympic Games saw the reinstatement of professional figure skaters Brian Boitano, Jane Torville and Christopher Dean, as well as the first outing of the Dream Team,

and has opened the door for increased attorney-agent representation of Olympic competitors, as unique opportunities in product endorsement, performance and appearance income become available for these athletes.<sup>6</sup>

This Article presents an overview of the issues which will confront an attorney who undertakes the representation of an Olympic athlete. Part II defines "amateur" athlete, discussing the concept in both its historical and modern sense. Part II also analyzes the recent IOC rule change which now allows professional athletes to compete as "eligible athletes" in the Olympics. Part III examines the unique attorney-client relationship which is formed when an attorney undertakes to represent an Olympic athlete and explores the ethical obligations and dilemmas which arise from that relationship. Part IV provides practical suggestions for a representation agreement for an Olympic athlete. Part V concludes that only the well-informed and conscientious attorney should undertake the representation of an Olympic athlete.

## II. BACKGROUND: WHAT IS AN AMATEUR?

### A. Greece: The Original Olympics

Mention the ancient Olympics<sup>7</sup> and you might find that many individuals are awed by the "Olympic ideal," believing that in an-

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the United States' National Basketball Team. See George Vecsey, *Sports of the Times: Olympics Crossing the Magic Line*, N.Y. TIMES, July 19, 1992, at A2 ("For the first time, pro athletes are competing who are bigger than the Games."); see also, SUSAN WELS, *THE OLYMPIC SPIRIT: 100 YEARS OF THE GAMES* 80 (1995) (noting 1992 Barcelona Games were first to allow professional athletes to compete in basketball and stating "the US assembled the most magnificent team ever, with a roster of hoop idols, including 'Magic' Johnson").

6. See Marcia B. Nelson, Note, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic National Governing Bodies*, 26 VAND. J. TRANSNAT'L L. 895, 896 n.2, n.4 (1993) (noting increased commercialism of Olympic Games and today's Olympic athlete's ability to receive appearance fees and prize money). For a further discussion of the commercial enterprises confronting today's Olympic athlete, see *infra* note 39 and accompanying text.

7. The ancient Greeks held numerous, regularly-scheduled athletic contests and festivals. WELS, *supra* note 5, at 26. The term "Olympics" denotes the athletic festival held at Olympia every four years in honor of Zeus, known to be the greatest of all ancient Greek athletic competitions. *Id.* The Olympics, one of the four games which comprised the circuit of Crown Games, or *periodos*, allowed the best competitors in Greece to compete in events such as the pentathlon, the pancratium and the equestrian contests; as well as competitions in running, wrestling and boxing. *Id.* The competitions at Olympia were strictly athletic and did not include musical competitions, unlike those competitions held in Nemea, Corinth and Delphi, the locations of the other three Crown Games. *Id.* So great was the Olympic festival that simply to attend and witness the Olympic Games was considered an honor, for the most renowned artists, politicians, poets, writers, sculptors and intellectuals were often present. See *id.* at 22 (noting that over 40,000 citizens from

cient Athens, if nowhere else, money and prizes did not motivate the athletes.<sup>8</sup> Indeed, many people tend to think that the notion "[it] is not to win, but to take part"<sup>9</sup> is rooted in antiquity - that such a viewpoint was established by the Greeks in the creation of the very first Olympic Games.<sup>10</sup> However, this is a misconception.<sup>11</sup> For the Greek Olympic athletes, the converse was true. "Taking part *and winning* were the ancient goal."<sup>12</sup> Even to get second place, there-

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Greek towns and city-states journeyed to this event). For a discussion of the competitions held during the five-day Olympic festival, see *id.* at 29-34.

8. This belief is far from correct, for the idea that an athlete could not earn money from competitions was foreign to the Greeks, particularly as Olympic victories became more important to the city-states as a way of bringing prestige to their city. See WALDO E. SWEET, *SPORT AND RECREATION IN ANCIENT GREECE* 121 (1987).

9. See HILL, *supra* note 2, at 7 (noting Baron de Coubertin propagated this "entirely un-Greek idea"). The entire statement reads, "The important thing at the Olympic Games is not to win, but to take part; for the essential thing in life is not to conquer, but to struggle well." *Id.* Statements like this, as well as the concept of "sport for sport's sake," were used by men such as Caspar Whitney, John Mahaffy, Baron de Coubertin, Avery Brundage, E.N. Gardiner and Paul Shorey to propagandize the type of sporting contests which they revered. See, e.g., DAVID C. YOUNG, *THE OLYMPIC MYTH OF GREEK AMATEUR ATHLETES* 49 n.45 (1984). For criticism of the views of many of these men, see *id.* at 8-14, 76-88.

The theme of the ancient Olympics could be better described by the notion to "always be the best and excel over others." *THE OLYMPIC GAMES* 41 (Iris Douskou ed., 1976) [hereinafter *THE OLYMPIC GAMES*]. This latter statement, famed to be the "legendary exhortation of Peleus to his son Achilles, as Achilles was about to set off for the Trojan War," has been deemed "an illuminating expression of the attitude and ideals not only of the Homeric heroes, but of the Greeks throughout the historic course of antiquity." *Id.*

10. The first Olympic Games were held in 776 B.C. *Id.* at 8. Although these renowned games had a spiritual and religious depth, they were highly competitive in nature, as each athlete sought to prove he was "better than his neighbour." See *THE ETERNAL OLYMPICS: THE ART & HISTORY OF SPORT* 9 (Nicolao Yalouris ed., 1979). In fact, the notion of competition for competition's sake did not exist in the early Olympic Games. JOHN KEIRNAN & ARTHUR DALEY, *THE STORY OF THE OLYMPIC GAMES, 776 B.C. TO 1972* 15 (rev. ed. 1973) (noting brutality of competitions such as pancratium, which combines boxing and wrestling, resulted in several deaths). See also, WELS, *supra* note 5, at 33 (citing boxing as particularly brutal ancient Olympic event, where competitors wrapped their fists with leather strips, weights or metal spikes and brutally beat one another until one competitor either fell unconscious or surrendered).

11. See WELS, *supra* note 5, at 33 (stating "winning was everything to Olympic competitors"); YOUNG, *supra* note 9, at 107-76. In *The Olympic Myth of Greek Amateur Athletics*, Young contends that this false conception of history originated with Baron de Coubertin in 1896 in his effort to revise the Olympic Games. See *id.* at 57-75. For a brief discussion of Baron de Coubertin's revival of the Olympic Games, see *infra* notes 24-29 and accompanying text.

12. SWEET, *supra* note 8, at 118 (emphasis added); see also, YOUNG, *supra* note 9, at 91 ("It is hard to find a phrase that would have shocked the ancient Greeks more than the modern Olympic credo 'to participate is more important than to win'") (citing H.W. PLEKET, *GAMES, PRIZES, ATHLETES AND IDEOLOGY* 59 (1979)).

fore, was a disgrace for the Greeks.<sup>13</sup> True “amateurs,” as we define the term today,<sup>14</sup> did not exist.<sup>15</sup>

Although many people believe that the concept of the “amateur athlete” originated in ancient Greece, the term had no place in

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13. SWEET, *supra* note 8, at 118. Accordingly, recognition or prizes for second or third place were rarely given in the ancient games and, during the Crown Games, recognition for second and third place was not given at all. HEINZ SCHOBEL, *THE ANCIENT OLYMPIC GAMES* 99 (Joan Becker trans., 1965). Accord, WELS, *supra* note 5, at 23 (noting victory alone counted and stating ancient Olympic athletes often prayed for “the wreath or death”). Even a tie for first place would not bring a competing athlete the glory he desired, as, in the event of a tie, the crown was dedicated to the god. JUDITH SWADDLING, *THE ANCIENT OLYMPIC GAMES* 41 (1990).

14. *Webster's Dictionary* defines “amateur” as “an athlete who has never used any athletic art professionally or as a means of livelihood; one who has not taken part in contests open to professionals.” WEBSTER'S NEW 20TH CENTURY DICTIONARY 55 (2d ed. 1979). But see OLYMPIC CHARTER R. 26 (changing definition of Olympic athlete from “amateur” to “eligible” and stating that competitors must look to rules established by IFs to determine eligibility). Cf., 1994 USATF DIRECTORY, USA Track & Field Regulation 9 (1994) (adhering to IAAF eligibility regulations, prohibiting competing athletes from receiving any pecuniary rewards or other remuneration, but excepting certain expenses for training and event participation); OFFICIAL RULES, USA BOXING, 1993-1995, Article XIX Eligibility/Disqualification 219.1 (1993) (referencing AIBA Eligibility Code, allowing competing athletes only limited and authorized financial assistance; permitting competing athletes only authorized publicity ventures; and prohibiting professional athletes or coaches from competing); 1994-1995 USFSA RULEBOOK, Eligibility Rules, E.R. 1.01, E.R. 4.00 (1994) (providing athletes may perform in certain sanctioned skating events outside Olympics; permitting athletes to accept limited instructing or officiating remuneration; and providing for contract approval through USFSA). For a further discussion of the rule change allowing professional athletes to compete in the Olympics and the impact of this rule change on the Olympics, see *infra* notes 30-60 and accompanying text.

15. Beginning as early as age seven, young Greek boys were taught “to increase their strength and grace through exercise.” WELS, *supra* note 5, at 22; *THE OLYMPIC GAMES*, *supra* note 9, at 8. As the boys grew older, strict instructors trained them in running, wrestling, discus and javelin throwing, boxing, jumping and ball sports. WELS, *supra* note 5, at 22. Rigorous physical exercise kept the young Greek men in shape, not only for the Olympic festivals, but also for the constant warfare among the city-states. *Id.*

Although “it is arguable that the [Greek] society was not yet suitable for the fully professional athlete in the financial sense,” most athletes spent a considerable amount of their time training for the Olympics and were financially supported in their endeavors. See DONALD G. KYLE, *ATHLETICS IN ANCIENT ATHENS* 148-49 (1987). Sponsorship in chariot races was common from the early days of the Games and at the athletic festivals it was rare for a charioteer to be the owner of the chariot and the team he was driving. SWADDLING, *supra* note 13, at 70-71. Similarly, jockeys in horse-races were often paid servants, although some owners did compete themselves as such horse-sports were considered an aristocratic pastime. *Id.* at 73. Cf. H.A. HARRIS, *GREEK ATHLETES AND ATHLETICS* 37 (1966) (arguing ancient competitors were drawn primarily from wealthier class, who alone had leisure time to train and money to travel to festivals and crediting entry of lower class into Games as result of professionalism and demise of Games); KYLE, *supra*, at 136-37 n.64 (same).

Greek life.<sup>16</sup> In ancient Greece, Olympic victors could expect to be substantially rewarded for their victory.<sup>17</sup> Although the only prize awarded to an athlete at the ancient Olympics<sup>18</sup> was a crown made from the branches of wild olive,<sup>19</sup> Olympic victors were substantially rewarded by their city-states upon their return home from the Games.<sup>20</sup> The Greeks believed that an Olympic victory was owed to

16. See YOUNG, *supra* note 9, at 7-8 n.1 (stating Greek word *athletes*, which means "competitor for a prize" was never connected with Greek word *idiotes*, which means "a non-participant, . . . wholly unskilled," as such connection amounts to contradiction).

17. HARRIS, *supra* note 15, at 37; WELS, *supra* note 5, at 23 (noting victors often received awards such as lifetime pensions and large payments for appearances following Olympic victory). In fact, in ancient Greece, excelling at the Olympics could be a very profitable experience for the Olympic competitor. For example, in Athens, Solon's law granted rewards as high as 500 drachmae for the Olympic victors. HARRIS, *supra* note 15, at 37. See also RACHEL SARGENT ROBINSON, SOURCES FOR THE HISTORY OF GREEK ATHLETICS 59 (rev. ed. 1955) (noting 594 B.C. law passed by Solon awarded substantial sums of money to Olympic victors). This was a substantial sum for the athlete, considering that the reward of even 100 drachmae equalled almost a year's earnings for the working man. HARRIS, *supra* note 15, at 37. For the lower-class athlete, the prize was enough to allow him to enter the upper-class. ROBINSON, *supra*, at 59 (stating Athenian victor at Olympia would have been able to buy 500 bushels of grain and thereby enter class of "topmost financial rating for that one year"). But see KYLE, *supra* note 15, at 149 (arguing that existence of prizes and civic rewards resulted in no sudden change in social classes of athletes).

18. At other ancient athletic festivals, numerous and valuable prizes were awarded to the victors. See HARRIS, *supra* note 15, at 36 (enumerating various prizes awarded at ancient festivals); see also SWEET, *supra* note 8, at 119 (noting enormous rewards, including money and articles of value, were frequently bestowed on victors of athletic competitions other than Crown Games).

19. At Olympia, the olive crown was called the *kotinos*. THE OLYMPIC GAMES, *supra* note 9, at 113. The branches which formed the crown were cut with gold shears by a young boy whose parents were both alive. SCHOBEL, *supra* note 13, at 99; SWADDLING, *supra* note 13, at 74. The other Crown Games bestowed crowns upon their victors as well, although those crowns were not composed of the treasured wild olive branches. WELS, *supra* note 5, at 26. At the Pythian Games, the victor received a crown of laurel, while the victor at the Isthmian Games received a crown of pine branches and the victor of the Nemean Games received a crown of wild celery. *Id.* The importance of these crowns were immeasurable, as they represented the honor, dignity and uprightness of the athlete. THE OLYMPIC GAMES, *supra* note 9, at 113; see also SWADDLING, *supra* note 13, at 74 (stating that "[the] greatest achievement for an athlete in the ancient world was to win the Olympic crown" and noting that material prizes given at other ancient athletic festivals "were insignificant when compared to the fame and glory earned by the Olympic victor"). After returning home, the athlete would in turn offer the crown as a gift to his household, clan, city, ancestors, or gods. THE OLYMPIC GAMES, *supra* note 9, at 113.

20. KYLE, *supra* note 15, at 145; RICHARD D. MANDELL, THE FIRST MODERN OLYMPICS 8 (1976); THE OLYMPIC GAMES, *supra* note 9, at 134-41. Upon an Olympic victor's return home, he was often greeted with tremendous enthusiasm from his city-state. THE OLYMPIC GAMES, *supra* note 9, at 136. For example, Exainetos, who won the stade race for the second time in 420 B.C. was escorted by a procession of three-hundred chariots drawn by white horses. SWADDLING, *supra*

the favor and approval of the gods of both the athlete and his city.<sup>21</sup> The victory ensured honor, glory, fame and rewards.<sup>22</sup> In the world of ancient Greece, therefore, " 'athlete' literally meant, and always meant, 'competitor for a prize.' "<sup>23</sup>

### B. The Modern Olympic Movement: The Seeds of "Amateurism" Planted

In 1892, a Frenchman named Baron de Coubertin began a campaign to revise the Olympic Games.<sup>24</sup> The spirit of the interna-

note 13, at 77. Others were often given lavish receptions and celebrations. *See id.* at 76-77 (noting honors and celebrations bestowed upon ancient Olympic victors upon their return home). *But cf.* E. NORMAN GARDINER, GREEK ATHLETIC SPORTS AND FESTIVALS 76-78 (1910) (acknowledging honors and celebrations but denying such honors and celebrations as rewards for victory in Panhellenic Games).

21. *See* HARRIS, *supra* note 15, at 37 (noting Olympic victors expected tremendous material rewards from his city-state for glory which his victory brought it); *accord*, MANDELL, *supra* note 20, at 8, 134 (stating that Olympic victory confirmed physical prowess of individual athletes, as well as heavenly favor for athlete, his family and his polis); THE OLYMPIC GAMES, *supra* note 9, at 136 (stating ancient Olympic victors were granted substantial rewards from city-states "for the receipt of the crown bestowed fame and glory on the athletes' city-state as well").

22. THE OLYMPIC GAMES, *supra* note 9, at 78. *See also*, KYLE, *supra* note 15, at 148-49 (noting that Olympic victors "[were] on a very good thing"). Olympic victors shared in divine splendor with the gods, and were often worshipped as heroes upon their return to their cities and even after their deaths. THE OLYMPIC GAMES, *supra* note 9, at 80, 140-41. Victors were often immortalized in statute, *id.* at 137; SWADDLING, *supra* note 13, at 77; WELS, *supra* note 5, at 20-22, upon coins, or in poetry. THE OLYMPIC GAMES, *supra* note 9, at 140-41; WELS, *supra* note 5, at 20-22. In addition, they received special privileges such as the ability to dine for life at the public's expense; expensive gifts and substantial sums of money; exemption from taxes and other dues; and special seats of honor at future games. SCHOBEL, *supra* note 13, at 102; SWADDLING, *supra* note 13, at 77; SWEET, *supra* note 8, at 119-21.

23. YOUNG, *supra* note 9, at 7-8, n.1. Young explains that the word "athlete" is derived from the word "athlon," which meant "prize." *Id.* Young criticizes the opposing view of Gardiner, who claims that the Greek word for amateur was "idiotes." *Id.* According to Young, "amateur" connoted some involvement in and devotion to the games; whereas the term "idiote" had the opposite meaning, connoting a non-participating and unskilled individual. *Id.* Further, Young contends that the Greek words "idiotes" and "athletes" were never joined as the English compound "amateur athlete" because the terms were mutually exclusive. *Id.*; *see also* DONALD W. CALHOUN, SPORT, CULTURE AND PERSONALITY 79 (2d ed. 1987) (defining word "athlete" to mean "prize" and stating origination from term "athlos" which "unit[ed] the concepts of contest, struggle, exercise, exertion, endurance and suffering"); KYLE, *supra* note 15, at 21 (noting Greek word "athlete" came from Homeric term for "exertion, effort, contest, struggle or deed").

24. YOUNG, *supra* note 9, at 58-60. The Olympics had been banned in A.D. 394 by the Emperor Theodosius I. *See* WELS, *supra* note 5, at 34. Many theorize that this ban was attributed to corruption surrounding the games, caused mainly by the entry into the games of athletes who no longer viewed the games as purely recreational. *See, e.g.*, GARDINER, *supra* note 20, at 79-82; *see also*, WELS, *supra* note 5, at 34 (attributing bribery as cause of degeneration and ultimate ban of Games). *But see*, NAFZIGER, *supra* note 1, at 16-17 (discussing increased secularism, combined with commercialism, as impetus leading to Games' decline); SWADDLING,



tional competition which Coubertin established ideologically followed the ancient Greek practice—allowing men of all countries to temporarily set aside their differences in an effort to recognize, and perhaps promote, man's physical and mental prowess, democratic equality and human brotherhood.<sup>25</sup> In actuality, the modern movement conformed more to the ideals of earlier British competitions,<sup>26</sup> rather than to the ideals of the ancient Olym-

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*supra* note 13, at 78 (crediting decline in belief of traditional religion with degeneration of Games). Cf. HARRIS, *supra* note 15, at 122-48 (arguing professionalism as destruction of any true sport; citing entry of professionalism into ancient Olympics, transforming Games from recreation to entertainment; but stating that cases of corruption were rare in Olympia due to its ancient prestige).

Coubertin's effort to revise the ancient Olympics, however, was not the first of such efforts, as several, short-lived attempts preceded his. For a brief discussion of these earlier attempts to revise the Olympics, see SCHOBEL, *supra* note 13, at 114; YOUNG, *supra* note 5, at 28-38. This idea, however, was more or less an afterthought for Coubertin. YOUNG, *supra* note 5, at 58-59. Originally, his objective was to reform French education in order to instill physical fitness into the country's youth. *Id.* His original scheme "to introduce British-style athletics in French schools and to form French amateur athletic clubs after English models" was rejected by the French. *Id.* at 58-59. But, after traveling to England in 1890 and observing the "Olympic Games," which were sponsored by Dr. W. Brookes and consisted of traditional English village games, Coubertin was so awed by the pomp and circumstance which surrounded the Games that he was motivated to revise his own version of the Games in the form of international competition, shifting his attention away from his original goal. *Id.*

25. See THE OLYMPIC GAMES, *supra* note 9, at 9. From the start, however, the international characteristic made the modern games much more than a copy of the ancient Olympics. SCHOBEL, *supra* note 13, at 117. Today, the Olympic Games are far from Coubertin's original ambitions, as commercialism and international politics drive nations to outdo each other on the athletic field. See NIXON, *supra* note 2, at 152-53 (noting modern Olympians have evolved far from noble founding "principles of international brotherhood, joyful play, and participation as an end in itself").

26. Jeremy Crump, *Athletics*, in *SPORT IN BRITAIN: A SOCIAL HISTORY* 44 (Tony Mason, ed. 1989) (noting that sport in its modern form developed from English athletic clubs, like most exclusive Amateur Athletic Club). In order to bar working class men from competition, English scholars set up an elitist athletic system. YOUNG, *supra* note 9, at 15. Finding it "distasteful to compete" against, and to dress with, the working class, these men also feared "the disgrace" of losing to working class competitors. *Id.* at 18. Organizations such as the Amateur Athletic Club (AAC), formed in 1866, strictly prohibited all working class individuals from membership and hence, competition. *Id.* at 20. The AAC, which later became known as the Amateur Athletic Association (AAA), was formed by three former Oxford athletes. Crump, *supra*, at 48. These university men and those associated with them sought to "disassociate themselves from professional pedestrians and the inheritance of eighteenth-century traditions of races for wages between the servants of gentlemen." *Id.* at 50. They developed an exclusive code of rules which allowed only aristocrats to compete. *Id.* at 50-51. In 1867, the AAA Club Rules provided:

An amateur is a person who has never competed in an open competition, or for public money, or for admission money, and who has never at any period of his life taught or assisted in the pursuit of athletic exercise as a means of livelihood, or is a mechanic, artisan, or labourer.

*Id.* at 50. This rule was not revoked until 1880. *Id.* at 51.

pics.<sup>27</sup> Like the British, Coubertin, and several of his followers, sought to establish an elitist system of athletic competition by prohibiting Olympic athletes from receiving remuneration of any kind.<sup>28</sup> These rules limited the economic opportunities available to modern Olympians and, for many years, prevented potential Olympic athletes who did not have funding and support from competing.<sup>29</sup>

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27. Ancient Greek philosophy promoted the cultivation and well-being of the body and the mind, and, though few men made their livelihood from athletic competition, all generally were encouraged to train and compete. However, despite the view of ancient Greek society that all men should be allowed to rise up and compete with their neighbors, the Olympic Games were actually not open to all who wished to compete. See *THE OLYMPIC GAMES*, *supra* note 9, at 109. Restrictions on the qualifications of the competitors were strictly observed. *Id.* First, all competitors had to be Greeks. *Id.*; see also SCHOBEL, *supra* note 13, at 54 (noting that slaves were not allowed to compete). In addition, the Greeks required all competitors to participate in a prescribed ten-month period of preparation for the Games at home and in a concentrated one-month training session in Elis immediately preceding the Games. *THE OLYMPIC GAMES*, *supra* note 9, at 110; SCHOBEL, *supra* note 13, at 55. Those who had not trained carefully and did not seem suitable for competition were excluded. SCHOBEL, *supra* note 13, at 53. This latter requirement undoubtedly screened out many potential competitors in the earliest years of Olympic competition, for only those from the wealthier classes could forego working to train so intensely for the competitions and to travel long distances to Olympia. HARRIS, *supra* note 15, at 37. But, as time went on and victories became increasingly important to the city-states, rich patrons and city-states began to subsidize talented, non-aristocratic athletes in order to encourage their participation in the Games. SCHOBEL, *supra* note 13, at 54.

28. In the earliest of the Modern Olympics, athletes were prohibited from receiving compensation or monetary support of any kind. See YOUNG, *supra* note 9, at 63. Gradually, the total ban was eased, with Olympic athletes being allowed to withdraw money from specified trust funds set up for training. See, e.g., Nelson, *supra* note 6, at 896 n.3 (noting past amateur track and field athletes were permitted to sign advertising and sponsorship deals, provided their earnings were placed in IAAF trust funds). If the Olympic athlete did not use all of this money while training for the Olympics, he lost it. *Id.* Financial assistance has also been recently awarded to many Olympic competitors to help defray the training and living expenses. See 1995 FACT BOOK, *supra* note 1, at 25-27 (listing available USOC grants); see also Leigh Montville, *Silver Threads Among the Gold*, *SPORTS ILLUSTRATED*, July 22, 1992, at 100-04 (discussing effect of U.S. Swimming's assistance program).

29. Most Olympic athletes face huge expenses in connection with their training, little of which is subsidized by the federal government or by their independent federations. David J. Morrow, *How to Quit Losing in the Olympics*, *FORTUNE*, Apr. 24, 1989, at 265, 266 (quoting Brian Boitano's statement that parents can spend up to \$30,000 per year on training and ice time can equal up to \$200 per day). See WELLS, *supra* note 5, at 15 (stating for many athletes today journey to Olympic Games is difficult, costing great expenses in time, money and effort by Olympic athletes, their families and, in some instances, other outside supporters). Accordingly, due to the substantial time commitment it takes to prepare to compete in the Olympic Games, without commercial sponsorship, often only those athletes originating from a wealthy family are able to compete. See *id.* (noting prohibitive costs for US fencers to compete in 1987 World Championships in Switzerland, when athletes and their families were forced to raise nearly \$52,000 in airfare).

### C. The Olympics Today

Today, the IOC and several of its associated organizations have abandoned Coubertin's original definition of amateurism<sup>30</sup> and have returned to the true ancient practice which permitted Olympic athletes to be rewarded in their athletic endeavors.<sup>31</sup> As a result of this rule change<sup>32</sup> enacted by the IOC<sup>33</sup> and adopted by most of

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30. The abandonment of Coubertin's concept of amateurism is attributed to the growing perception that the distinction between amateur and professional athletics had blurred. NAFZIGER, *supra* note 1, at 142-43 (attributing this perception to increases in commercialization, compensation to athletes for lost time in work-place, large athletic scholarships and state-supported athletics programs). *See id.* at 140 (quoting Edwin Moses as stating "[a]mateur athletics is just a play on words" and stating that he admitted to receiving \$457,000 in 1983 while competing as "amateur" Olympic athlete).

31. Nevertheless, for those individuals who remain awed by the "Olympic ideal," the Olympic Order remains as one incentive for competing athletes in their strive for personal, rather than financial, excellence. *See* 1995 FACT BOOK, *supra* note 1, at 73 (explaining Olympic Order as establishment created to "honor those persons who have illustrated the Olympic ideal through their actions, have achieved remarkable merit in the sporting world, or have rendered outstanding services to the Olympic cause, either through their own personal achievements or their contributions to the development of sport"). For a list of Olympic Order recipients from the United States, *see id.*

32. OLYMPIC CHARTER R. 26. The IOC originally limited participation in the Olympics to "amateur" athletes. *Id.* The IOC's original definition of "amateur" was "one who participates and always has participated in sport solely for pleasure and for the physical and mental benefits he derives therefrom, and to whom participation in sport is nothing more than recreation without material gain of any kind, direct or indirect." *Id.* Gradually, the IOC has come to allow athletes competing in the Olympic Games to receive remuneration, whether from endorsements, appearances or professional contracts. *See* Dave Anderson, *Olympics Take a First Step on the Road to Reality*, N.Y. TIMES, Feb. 7, 1988 at S3 (noting trust funds assisted athletes such as Carl Lewis, Edwin Moses, Ben Johnson and Jackie Joyner-Kersey in obtaining money to train for Olympic Games). This change did not come abruptly, however. *See* BERRY & WONG, *supra* note 1, at xiv-xv (noting evolution of eligibility rules). In 1982, the IOC began allowing the individual IFs and NGBs to develop their own eligibility rules. *Id.* In 1985, the IOC voted to allow professionals under the age of 23 to compete in the sports of tennis, ice hockey and soccer. *Id.* at 2 n.2 (citing *Olympics to Allow Pros in 3 Sports*, N.Y. TIMES, Mar. 1, 1985, at A19). It was not until after the 1988 Olympic Games, however, that the IOC allowed all IFs and NGBs to determine whether professional athletes would be permitted to compete in their sports. OLYMPIC CHARTER R. 26. Rule 26, if adopted by the IFs and NGBs, permits "liberal, though not unlimited, subsidization while training and competing." Herb Weinberg, *The Games Athletes Must Play for Money*, N.Y. TIMES, Nov. 8, 1981, at S2.

33. Until 1987, the IOC made the ultimate determinations of eligibility for athletes competing in the Olympic Games. Within the broad limits established through the amended Rule 26, each NGB and its corresponding IF now control athlete eligibility for their particular sport. *See supra*, note 1. Many commentators praised this rule change, arguing that it would bring an end to under-the-table payments which many athletes had been receiving for years. *See, e.g.,* Weinberg, *supra* note 32, at S2 (discussing athletes "living off the fruits of competition, like professionals, but remaining amateurs").

the IFs<sup>34</sup> and NGBs,<sup>35</sup> Olympic contenders may now receive remuneration<sup>36</sup> while training and competing as "eligible" Olympic ath-

34. The current Olympic International Federations include: International Amateur Athletic Federation; International Rowing Federation; International Badminton Federation; International Amateur Basketball Federation; International Bobsleigh and Tobogganing Federation; International Amateur Boxing Association; International Canoe Federation; International Amateur Cycling Federation; International Equestrian Federation; International Fencing Federation; International Association Football Federation; International Gymnastics Federation; International Handball Federation; International Hockey Federation; International Ice Hockey Federation; International Judo Federation; International Luge Federation; International Amateur Wrestling Federation; International Modern Pentathlon and Biathlon Union; International Skating Union; International Skiing Federation; International Table Tennis Federation; International Tennis Federation; International Shooting Union; International Archery Federation; International Volleyball Federation; International Weightlifting Federation and International Yacht Racing Union. NAFZIGER, *supra* note 1, 229-30. Other recognized International Federations include: International Baseball Association; International Curling Federation; International Orienteering Federation; International Federation of Pelota Vasca; International Bowling Federation; International Roller-Skating Federation; International Squash Rackets Federation; International Amateur Racquetball Association; International Softball Federation; The World Taekwondo Federation; World Water-Skiing Union; World Union of Karetado Organizations and World Underwater Federation. *Id.*

35. Pursuant to the Amateur Sports Act of 1978, the United States Congress established the authority of the United States Olympic Committee (USOC), America's NOC, to designate one NGB per amateur sport as the governing body for that sport. 36 U.S.C. §§ 371-96 (1994). The Act enumerated the specific responsibilities of a NGB, including the authority to establish the rules and regulations concerning competition for that sport and to select the national, international and Olympic team members representing that sport. *Id.* Currently the USOC recognizes the following NGBs: US Badminton Association, USA Gymnastics, USA Bowling, US Sailing Association, US Skiing, US Soccer Federation, National Archery Association, USA Baseball, USA Basketball, US Biathlon Association, US Bobsled and Skeleton Federation, USA Boxing, US Canoe and Kayak Team, US Curling Association, United States Diving, Inc., US Equestrian Team, US Fencing Association, US Field Hockey Association, US Figure Skating Association, USA Hockey, United States Judo, Inc., US Luge Association, US Modern Pentathlon, US Rowing Association, Amateur Softball Association, US Speedskating, US Swimming, Inc., US Synchronized Swimming, Inc., US Table Tennis, US Tennis Association, USA Track and Field, USA Volleyball, US Water Polo, US Weightlifting Federation and USA Wrestling. *See generally*, UNITED STATES OLYMPIC COMMITTEE DIRECTORY (1995).

36. It is important to note that any athlete who intends on competing under NCAA rules may, by accepting fees permitted under the applicable NGB and IF rules, have violated NCAA rules while remaining eligible for Olympic competition. *See NCAA BYLAWS, Amateurism*, art. 12, 69-72 (1995). The NCAA prohibits any of its athletes from accepting any money whether for endorsements or competition. *Id.* art. 12 § 1.1 (a), et. seq., 69-72. An athlete will be ineligible for NCAA competition if he or she has ever violated these rules. *Id.* art. 12. Further, the NCAA prohibits a student from participating if he or she agrees "orally or in writing" to be represented by an agent, and violation of this provision will also disqualify a student-athlete. *Id.* art. 3. § 1 (c). *But see* Lionel S. Sobel, *The Regulation of Player Agents and Lawyers*, in 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 1.01 et. seq. 1-27 to 1-31 n.357 (1990) (noting Article does not prohibit student-athlete from retaining attorney for advice concerning proposed professional sports contract).

The NCAA amateur status rules are as follows:

**12.1.1 Amateur Status.** An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability of any consideration received;
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team and knows (or had reason to know) that the team is a professional athletics team (per 12.02.5), even if no pay or remuneration for expenses was received, or
- (f) Enters into a professional draft or an agreement with an agent or other entity to negotiate a professional contract. (See 12.2.4.2.1 for exception related to the professional basketball draft.)

**12.1.2 Forms of Pay.** An individual loses amateur status through receipt of "pay," which includes, but is not limited to, the following practices:

- (a) Educational expenses not permitted by the governing legislation of this Association (see Bylaw 15 regarding permissible financial aid to enrolled student-athletes);
- (b) Any direct or indirect salary, gratuity or comparable compensation;
- (c) Any division or split of surplus (bonuses, game receipts, etc.);
- (d) Excessive or improper expenses, awards and benefits (see Bylaw 16 regarding permissible awards, benefits and expenses to enrolled student-athletes);
- (e) Expenses received from an outside amateur sports team or organization in excess of actual and necessary travel, room and board expenses, and apparel and equipment (for individual and team use only from teams or organizations not affiliated with member institutions, including local sports clubs as set forth in 13.12.2.4) for competition and practice held in preparation for such competition. Practice must be conducted in a continuous time period preceding the competition except for practice sessions conducted by a national team which occasionally may be interrupted for specific periods of time preceding the competition; (*Revised: 1/10/90, 1/10/92*)
- (f) Actual and necessary expenses or any other form of compensation to participate in athletics competition (while not representing an educational institution) from a sponsor other than an individual upon whom the athlete is naturally or legally dependent or the nonprofessional organization that is sponsoring the competition;
- (g) Expenses received by the parents or legal guardians of a participant in athletics competition from a nonprofessional organization sponsoring the competition in excess of actual and necessary travel, room and board expenses or expenses not made available to the parents or legal guardians of all participants in the competition; (*Adopted: 1/16/93*)
- (h) Payment to individual team members or individual competitors for unspecified or itemized expenses beyond actual and necessary travel, room and board expenses for practice and competition;
- (i) Expenses incurred or awards received by an individual that are prohibited by the rules governing an amateur, noncollegiate event in which the individual participates;

- (j) Any payment, including actual and necessary expenses, conditioned on the individual's or team's place finish or performance or given on an incentive basis, or receipt of expenses in excess of the same reasonable amount for permissible expenses given to all individuals or team members involved in the completion;
- (k) Educational expenses provided to an individual by an outside sports team or organization that are based in any degree upon the recipient's athletics ability [except as specified in 15.2.5.4-(h)], even if the funds are given to the institution to administer to the recipient;
- (l) Cash, or the equivalent thereof (e.g., trust fund), as an award for participation in competition at any time, even if such an award is permitted under the rules governing an amateur, noncollegiate even if which the individual is participating. An award or a cash prize that an individual could not receive under NCAA legislation may not be forwarded in the individual's name to a different individual or agency;
- (m) Preferential treatment, benefits or services because of the individual's athletics reputation or skill or pay-back potential as a professional athlete, unless such treatment, benefits or services are specifically permitted under NCAA legislation, and (*Revised: 1/11/94*)
- (n) Receipt of a prize for participation (involving the use of athletics ability) in a member institution's promotional activity that is inconsistent with the provisions of 12.5 or official interpretations approved by the NCAA Council.

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*12.1.2.6 Exception for Family Travel to Olympic Games.* A commercial company (other than a professional sports organization) or members of the local community may provide actual and necessary expenses for an individual's spouse, parents, legal guardians or other relatives to attend the Olympic Games in which the individual will participate. (*Adopted 1/11/94*)

....

*12.1.3 Professionalism.* An individual is not eligible for participation in an intercollegiate sport if that individual ever has been a professional in that sport. An individual becomes a professional if he or she:

- (a) Signs a contract or commitment of any kind to participate in professional athletics in that sport regardless of its legal enforceability or any consideration received;
- (b) Participates on a team and knows (or had reason to know) that the team is a professional athletics team (per 12.02.5) in that sport, or
- (c) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional organization in that sport based upon athletics skill or participation, except as permitted by the Association's legislation.

*12.1.4 Amateur Status if Professional in Another Sport.* A professional athlete in one sport may represent a member institution in a different sport. However, the student-athlete cannot receive institutional financial assistance in the second sport unless the student-athlete:

- (a) Is no longer involved in professional athletics;
- (b) Is not receiving any remuneration from a professional sports organization, and
- (c) Has no active contractual relationship with any professional athletics team. However, an individual may remain bound by an option clause in a professional sports contract that requires assignment to a particular team if the student-athlete's professional career is resumed."

NCAA BYLAWS, *Amateurism*, *supra*, art. 12, § 1.1(a) et. seq., 69-72.

letes.<sup>37</sup> This modification of the century old ban on the receipt of money by "eligible"<sup>38</sup> athletes has resulted in tremendous economic opportunities for Olympic athletes.<sup>39</sup> Today, unlike the past,

37. Not all NGBs allow eligible athletes to receive remuneration while competing. Some NGBs limit the athletes' ability to make money. For example, the United States Figure Skating Association has adopted the following eligibility rule:

*E.R. 4.01 Persons are not eligible in skating if they:*

.011 Enter or participate in a figure skating competition not sanctioned by the USFSA or not recognized by the I.S.U.;

.012 Accept direct or indirect pay or financial benefit for instructing or officiating in the skating except;

Physical education teachers in schools who teach skating as a subsidiary part of their dues without receiving specific additional remuneration; Registered skaters who are members of the Collegiate Skating Institute.

*See C.S.I. 1.00;*

Participants of the Eligible Skater Instructor Program. *See E.R. 3.00.*

.013 Perform in a non-sanctioned carnival or exhibition, including exhibitions at professional hockey games except as otherwise permitted under SR 3.047, or exhibitions held under professional auspices or for the benefit of for-profit business organizations or commercial ventures, except in accordance with contracts entered into or approved by the USFSA. *See S.R. 3.07.*

.014 Persons may, however, permit their name, photographs or personal appearances to be used for news reporting or to publicize a competition, carnival or exhibition sanctioned by the USFSA providing such use is not also directly associated with commercial advertising."

UNITED STATES FIGURE SKATING ASSOCIATION, *Eligibility Rules*, E.R. 4.01, RULEBOOK, 194 (1994-95). Further, some NGBs, like USA Boxing, have retained ancient prohibitions:

*Conditions for disqualification. A boxer member shall be barred from participating in any capacity in the Corporation's programs by committing any of the following acts:*

1. Competing for compensation.

(a) Coaching, instructing or preparing any person for competition when other than actual expenses incurred for that specific task are received beyond established limits.

(b) Receiving compensation for athletic services.

(c) Capitalizing on athletic fame.

(d) Competing with or against ineligible persons.

(e) Becoming a professional."

USA BOXING, OFFICIAL RULES 1993-1995, Art. XIX 161-68 (1995) (emphasis added). For several other differing NGB definitions of "amateur" eligible athletes and insight into the great variations among these rules, see *supra* note 14.

38. The enactment of Rule 26 by the IOC fostered the death of the "amateur" athlete within the context of the Olympic Games. OLYMPIC CHARTER R. 26. Today, an athlete must satisfy the eligibility rules of his or her sport to compete in the Olympics. *Id.* Hence the change in description from "amateur" athlete to "eligible" athlete. *Id.*

39. *See NIXON, supra* note 2, at 185 (stating that "[i]n a few major Olympic sports, the stars can now realistically dream about converting their Olympic medals and fame into a professional sports career" and noting that some athletes can also convert fame into lucrative commercial endorsements, jobs as commentators or careers in entertainment performances such as ice shows). For instance, shortly after winning the Silver medal in the 1994 Winter Olympics, Nancy Kerrigan signed endorsement deals totalling close to \$10 million. *See* Ginia Bellafante, *Gripes of a Golden Girl*, TIME, Mar. 14, 1994, at 109 (noting Kerrigan successfully

Olympic athletes successfully compete with professional athletes for endorsements and sponsorship opportunities.<sup>40</sup> Further, Olympic athletes now have the chance to capitalize on their athletic ability through participation in recently developed, NGB sanctioned,<sup>41</sup> pay-for-participation events<sup>42</sup> which compensate the athlete for his

obtained endorsement contracts with Revlon, Reebok and Disney). Other Olympic athletes have been successful in earning millions of dollars in endorsement contracts as well. See Bruce Horovitz, *Going for the Gold: Advertisers Race to Sign Olympic Medalists*, L.A. Times, Mar. 1, 1994, at 01 (discussing endorsement opportunities contemplated for many Olympic athletes); Allen St. John, *Stars Market Their Medals*, S.T.N., Nov. 1994, at 4 (enumerating endorsement contracts obtained by successful down hill skiers Tommy Moe and Picabo Street); see also George Garneau, *Olympic Promotion Dollars Are Up for Grabs*, EDITOR & PUBLISHER, Dec. 17, 1994, at 22 (noting Jackie Joyner-Kersey and Dan O'Brien signed as spokespersons for Xerox). No Olympic athlete is a sure thing, however, as a plethora of events could occur which might reduce or inflate the Olympic athlete's promotional abilities. See, e.g., Pete Anxthelm et al., *The Doped-Up Games*, NEWSWEEK, Oct. 10, 1988 at 54-55 (noting Ben Johnson lost between \$10 and \$15 million in endorsement contracts after testing positive for use of anabolic steroids in 1988); Laura Price, *Suddenly, Trouble*, NEWSDAY, May 16, 1994, at 2 (noting Nancy Kerrigan's low ranking of 27th in marketability for sports figures was reflection of embarrassing publicity and disparaging comments made by Kerrigan following her loss of gold medal to Oksana Baiul); Randy Rieland, *The Selling of Nancy Kerrigan and Bonnie Blair was Going According to Plan, Then Nancy Got Hit in the Knee and Everything Got Much More Interesting*, WASHINGTONIAN, May 1994 (discussing unexpected rise in promotional opportunities for Nancy Kerrigan following attack and noting same overshadowed five time gold medalist speed skater Bonnie Blair's endorsement opportunities).

40. Olympic athletes may also compete with NGBs for endorsements and sponsorships, particularly as commercialism of the Olympic Games continues to grow. See, e.g., Morrow, *supra* note 29, at 270 (stating Campbell Soup backed USFSA in past Olympics in exchange for several unpaid promotional appearances from one team member). Conflicts may arise from this competition, especially if an Olympic athlete wants to endorse a product which competes in the marketplace with a product endorsed by their NGB. See, e.g., Dave Anderson, *Loyalty to Company or Country?*, N.Y. TIMES, August 2, 1992, at S1 (discussing conflict which arose when Nike endorsers, Michael Jordan and Charles Barkley, threatened not to appear at award ceremony if forced to wear official USA team warm-up suits provided by Reebok); see also, Stephen M. McKelvey, *Atlanta '96: Olympic Countdown to Ambush Armageddon?*, 4 SETON HALL J. SPORT L. 397, 443 n.216 (1994) (discussing conflict which arose when Pepsi-Co, who had exclusive contract with Shaquille O'Neal, refused to allow O'Neal to sign contract with USA Basketball team to compete in 1992 Olympic Games because Coca-Cola and McDonald's were official USA Basketball sponsors). For an interesting discussion of commercialism in the Olympics and the friction existing among advertisers and promoters, see McKelvey, *supra*.

41. See United States Gymnastics Federation 1994-95 Women's Program Rules and Policies Section III (1994-95).

42. Some Olympic sports, including, without limitation, baseball, basketball, ice hockey, skating and sailing had professional elements prior to the eligibility rule changes. The athletes that competed in these sports could jump from the amateur ranks into the pros once their Olympic competing days were finished. Until 1992, no "professional" athlete could reinstate their eligibility and participate in Olympic competition. Once these athletes received monetary rewards for their competitions, they were no longer permitted to compete under past rules.



or her appearance<sup>43</sup> in sports such as skating,<sup>44</sup> gymnastics,<sup>45</sup> soccer<sup>46</sup> and track.<sup>47</sup> Furthermore, unlike the original IOC definition for eligibility,<sup>48</sup> today's eligibility code allows professional athletes, who were formerly banned from the Olympic Games,<sup>49</sup> to enter

43. Some of these events are competitions which promise minimum appearance fees set-off against the ultimate prize money. For example, "The International Challenge," a skating competition sanctioned by the ISU, allows athletes competing in a seven-city circuit to receive compensation for their appearance. See Kevin Acee, *Eldredge Avoids Falls, Takes Title*, L.A. DAILY NEWS, Mar. 30, 1995, at S9 (noting American skater Todd Eldredge won \$25,000 for his first-place finish, while Russian Ilia Kulik won \$20,000 for second place).

44. For example, "Tom Collins' Tour of World Figure Skating Champions, a 70-city extravaganza from which a top skater can earn \$750,000 [is] sanctioned because [it] meet[s] USFSA standards." Martha Duffy, *Crowded Ice*, TIME, Feb. 27, 1995, at 67, 68 [hereinafter Duffy, *Crowded Ice*]. The "Starlight Challenge," an outdoor international skating competition held in New York City, is another sanctioned skating competition. Robert Fachet, *Fanfare*, WASH. POST, Oct. 31, 1995, at E2.

45. For example, USA Gymnastics sanctions the 23-city "Tour of Olympic and World Champion Gymnasts." See Kim Q. Berkshire, *Sherbo Gains Fans on Tour Gymnastics*, L.A. TIMES, Oct. 30, 1992, at 1 (noting Olympic Gold medalist Vitaly Scherbo's intent to return home to Germany after Tour and before 1996 Olympics); *Gold Medal-Winning Gymnasts at Sports Arena Today*, L.A. TIMES, Nov. 1, 1992, at 10 (announcing Tour's visit to San Diego).

46. For example, the "World Cup" is U.S. Soccer Federation's sanctioned event. Julie Cart, *Politics of the World Cup Keep Sports Leaders on Their Toes*, L.A. TIMES, Feb. 14, 1994, at 11 (discussing financial and political concerns of "World Cup").

47. For example, the "Fifth Avenue Mile" is one of the races sanctioned by U.S. Track & Field. See Omara Sets Pac, *Then Runs Away to Win Fifth Avenue Mile*, L.A. TIMES, Sept. 29, 1985, at 2.

48. See *supra*, note 31.

49. The most infamous story involving an athlete being banned from Olympic competition involved Jim Thorpe, an athlete of remarkable skill who swept gold medals in the pentathlon and decathlon in the 1912 Stockholm Olympic Games. WELS, *supra* note 5, at 45. Six months after the Olympic Games, Thorpe was stripped of his medals for accepting money to play minor league baseball. *Id.* (stating Thorpe accepted \$25 per week). The irony in this tragedy was that Thorpe had not participated in the baseball league for the cash, but rather because of his dedication to sport. AMATEURISM & OPPORTUNITY, at 57 (citation omitted). His record was not reinstated until 1982. WELS, *supra* note 5, at 45.

Other Olympic athletes, including Olympic hurler Lee Calhoun, lost their amateur status in similar tragedies. See AMATEURISM & OPPORTUNITY, *supra*, at 57 (noting athlete lost amateur status because he received wedding gifts as part of his television appearance on "Bride and Groom"). See also NAFZIGER, *supra* note 1, at 140 (noting top skier's Ingemar Stenmark of Sweden and Hanni Wenzel of Liechtenstein lost amateur status after receiving commercial endorsement funds under prior FIS rules allowing for such remuneration when that authorization was revoked by FIS). Athletes continued to fight these "amateur" requirements into recent years, to no avail. See, e.g., *Oldfield v. The Athletics Congress*, 779 F.2d 505 (9th Cir. 1985) (holding athlete who lost amateur status because he signed professional performance contract in track had no cause of action to challenge 1984 USOC decision that he was ineligible to compete in 1984 Olympic Games); *Nehemiah v. The Athletics Congress*, 765 F.2d 42 (3d Cir. 1985) (ruling no cause of action for athlete to appeal USOC determination of his ineligibility to compete

Olympic competition, thereby increasing the demands on these athletes and furthering the commercialization surrounding the Games.<sup>50</sup>

Past prohibitions on the ability of Olympic athletes to receive any money other than limited approved funds for living expenses or training costs<sup>51</sup> have been removed in many Olympic sports, thereby allowing Olympic athletes to legitimately earn money while competing.<sup>52</sup> Some Olympic athletes now enjoy economic opportunities and lifestyle changes which they were previously forced to avoid.<sup>53</sup> Unlike prior years, many Olympic athletes may now openly endorse products and services, serve as coaches for other organizations, or compete in non-Olympic events for cash rewards. Because of this ability,<sup>54</sup> as well as the growing commercialism surrounding

in future Olympic competition in track and field after he signed professional football contract).

50. See William Oscar Johnson, *Goodbye Olive Wreaths, Hello Riches and Reality*, SPORTS ILLUSTRATED, Feb. 9, 1987, at 168 (discussing rule change allowing professionalism as contributor to revolutionization and commercialism of Olympic Games).

51. USA Track & Field and USA Skiing previously instituted a system of trust funds for the benefit of Olympic competitors. These trust funds were funded with winnings and appearance fees received by the athletes determined "eligible." The athletes were permitted to utilize these funds for their living and training expenses during their period of Olympic competition. If the Olympic athlete did not utilize the funds in his or her trust, those funds went to the NGB when the athlete retired or turned professional.

52. See NAFZIGER, *supra* note 1, at 148 ("These provisions offer greater flexibility . . . and reflect an awareness of the dilemma nonprofessional athletes face in having to support themselves while trying to meet the demands and expenses of training.")

53. *Id.*

54. The ability to cash in on commercial opportunities might be more realistic for some athletes than for others. Notably, the visibility and marketability granted any Olympic athlete may be either limited or enhanced by the sport he or she competes in, the television coverage given to that sport, the difficulty of the athlete's endeavor or mere chance. See David Halberstam, *Anatomy of a Champion*, VANITY FAIR, May 1996, at 125, 128 (profiling two 1996 US fencing team hopefuls and discussing tight travelling budget for same athletes "who, while representing one of the richest countries in the world, play sports that do not televise well or about which the public cares little"). For example, Eddie the Eagle, the British ski jumper, was successfully marketed because he was the worst athlete to compete in his event. See Mike Downey, *Joy of Defeat: Eddie the Eagle Has Yet to Soar*, L.A. TIMES, Feb. 20, 1988, at 1 (declaring "[n]ext thing I knew, Eddie was everywhere"); Jacqueline Saviano, *When Eagle Dares*, TIME, Jan. 23, 1989, at 35 (noting several negotiation deals arising only one week after athlete's hospital release). He was able to appeal to the Olympic athlete in all of us. See Downey, *supra*, at 1 (citing farce athlete's popularity and stating "somehow he had become the most popular snowman since Frosty"); *The Eagle of Britain Plummets to Glory*, L.A. TIMES, Feb. 16, 1988, at 2 (noting skier "has become a cult hero"). The Jamaican bobsled team also received high visibility due to the unlikely backdrop of a hot weather island supporting a cold weather sports team. WELS, *supra* note 5, at 115 (stating Jamaican bobsled team attracted worldwide attention and noting team gained bobsling skills

the Olympic Games<sup>55</sup> due to the popularity of athletics with the public,<sup>56</sup> Olympic athletes today, like professional athletes, need advisors for tax planning, estate planning, investment advice and contract negotiations.<sup>57</sup>

The advent of money promotions and the availability of Olympic athletes as product and service spokespersons, coaches and non-Olympic competitors, therefore, has caused the representation of Olympic athletes to become big business for attorneys and non-attorneys alike.<sup>58</sup> Competent attorneys may now choose to represent these Olympic athletes,<sup>59</sup> due to the expanse of sports law and the

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by practicing on snowless Jamaican mountains); Thomas Bonk, *The Jamaicans Arrive Hobbin and A Bobbin*, L.A. TIMES, Feb. 14, 1988, at 7 (citing fame of Jamaican bobsled team and noting several of team's marketing endeavors). In contrast, other athletes who were expected to be granted fame and fortune did not fare quite as well. See discussion *supra*, note 39.

55. See Nelson, *supra* note 6, at 896 n.2 (noting increased sale of television rights and increased prominence of sponsors in Olympic Games reflects increased commercialism). For an enumeration of the millions of dollars which have been paid by networks to retain exclusive rights to broadcast recent Olympic Games, see 1995 FACT BOOK, *supra* note 1, at 52 (listing payment of \$456 million by NBC for 1996 Game coverage).

56. See 1995 Fact Book, *supra* note 1, at 75 (declaring that "some two million visitors are expected to witness [the Games]" and "[t]he television audience is projected to be two-thirds of the world's population"). The popularity of these sports and the commercial opportunities which arise from them can be attributed to their presence on television. Cf. Lionel S. Sobel, *The Regulation of Player Agents and Lawyers*, in SPORTS LAW §§ 1.01-1.05 (1990) (noting that as professional sports grew into nationally televised business, greater commercial opportunities emerged for professional athletes). Any sport which has gained a television audience represents a commercial opportunity for the Olympic athletes who compete in it. See GEORGE W. SHUBERT ET AL, SPORTS LAW 126 (1986) (noting "advertising and related commercial activities have converted the sports business into a multi-billion dollar a year industry" and stating that players, now recognized celebrities, "have come to expect compensation for their personality status"); Bruce Horovitz & Joe Urschel, *Figure Skaters Now Celebrity Millionaires*, USA TODAY, Jan. 19, 1996, at 1 (indicating ice skating is now second most watched sport on television, exceeded only by football in ratings, and noting fame and fortune which this television coverage has brought).

57. Jeffrey P. Crandall, Note, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFF. L. REV. 815, 816 (1981) (noting athletes can greatly benefit from assistance of agent, insuring athlete benefits of publicity, endorsements, appearances, publishing and other "money-making endeavors").

58. While the economic opportunities, and hence, the need for representation, may be low for some Olympic athletes, there are some very visible sports in which the representation of Olympic athletes can be a prolific and prosperous endeavor. For example, sports such as skating, gymnastics, volleyball, skiing, basketball and track and field are all fertile grounds for an attorney-agent interested in representing an Olympic athlete due to the wide popularity and visibility of these sports in the public sphere.

59. SHUBERT, *supra* note 56, at 128 (1986) (stating competence on part of agent requires an "understanding of the sport, its management, and its business aspects"). For a discussion of the requirement of competence for an attorney un-

trend toward attorney-agents rather than non-attorney agents in the sports arena.<sup>60</sup>

dertaking the representation of an Olympic athlete, see *infra* notes 78-84 and accompanying text.

60. Because abuses in agent representation of athletes have risen in the past few years, many athletes are now seeking attorneys to represent them in their legal and business affairs. Robert E. Fraley & F. Russell Harwell, *The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 HASTINGS COMM. & ENT. L.J. 165, 170 (noting increasing improprieties by athlete-agents have led many professional athletes to turn to attorneys for services); Dana Alden Fox, *Regulating the Professional Sports Agent: Is California in the Right Ballpark?*, 15 PAC. L.J. 1231 (1984) (arguing attorney-agents are more scrupulous and likely to provide better representation to athletes than non-attorney agents). For a discussion of the abuses existing in the field of athlete-agent representation by non-attorneys, see Sobel, *supra* note 36, at § 1.01 et. seq. (discussing problems of misappropriation of funds, unscrupulous agent commissions, irreconcilable conflicts of interest and unprotected NCAA eligibility and blaming lack of regulation as cause); Crandall, *supra* note 57, at 819-33 (same); Fraley & Harwell, *supra*, at 165 (same); Gary P. Kohn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified*, 6 ENT. & SPORTS LAW 1, 1-8 (1988) (same).

Although some states have attempted to confront these abuses by instituting statutory guidelines for agent registration, few actively enforce these laws. Though combined with the regulatory attempts of professional sports leagues, see, e.g., Gregory W. McAleenan, *Agent-Player Representation Agreements in SPORTS LAW* § 2.01 et. seq., Exhibit F, 2-57 to 2-84 (1994) (stating NBPA regulations), these measures often prove inadequate. David L. Dunn, *Regulation of Sports Agents: Since at First it Hasn't Succeeded, Try Federal Legislation*, 39 HASTINGS L.J. 1031 (1988) (discussing failed regulatory and legislative attempts to govern non-attorney agents); Fox, *supra* at 1231 (analyzing existing legislative and internal provisions governing agents and discussing need for improvement). For example, although some states require that an athlete agent post a letter of credit or surety bond to cover any potential damages sustained as a result of that agent's failure to meet that state's statutory requirements, see, e.g., CAL. LAB. CODE § 1520 (West 1989 & Supp. 1996), often these bonds are inadequate compensation for the athlete whose financial status has been damaged by his agent's incompetence. SHUBERT, *supra* note 56, at 128 (noting bond posting requirements have proved inadequate in many states due to limited amount of required bonding). Moreover, although some state statutes limit the maximum compensation an athlete agent may receive from the athlete, see, e.g., ALA. CODE § 8-26-24 (1975 & Supp. 1995), if a state statute does not provide for such limitations, abuses by agents generally abound. See Crandall, *supra*, at 819-33 (discussing problems of misappropriation of funds and unscrupulous agent commissions); Fraley & Harwell, *supra*, at 165 (same); Kohn, *supra*, at 1-8 (same); Sobel, *supra* note 36, at 1-5 (same).

The following statutes regulating agents have been enacted. ALA. CODE §§ 8-26-3 to 8-26-41 (1975 & Supp. 1995); ARK. CODE ANN. §§ 17-16-101 to 17-16-203 (Michie 1987); CAL. LAB. CODE §§ 1500-1547 (West 1989 & Supp. 1996); FLA. STAT. ANN. §§ 468.451-468.457 (West 1991 & Supp. 1996); GA. CODE ANN. §§ 43-4A-1. to 43-4A-19. (1995); IOWA CODE ANN. §§ 9A.1.-9A.12. (1995); KY. REV. STAT. ANN. §§ 518.010.-518.080. (Michie/Bobbs-Merrill 1990 & Supp. 1994); LA. REV. STAT. ANN. §§ 4:421-4:430 (West 1987 & Supp. 1996); MISS. CODE ANN. §§ 73-41-1. to 73-41-23. (1972); N.C. GEN. STAT. §§ 78C.-71. to 78C.-81 (1995 & Supp. 1995); N.D. CENT. CODE §§ 9-15-01. to 9-15-05. (1987 & Supp. 1995); OHIO REV. CODE ANN. tit. XLVII, ch. 4771, § 4771.01-4771.99 (West 1995); OKLA. STAT. ANN. tit. 70, §§ 821.61-821.70 (West 1989); PA. CONS. STAT. ANN. tit. 18, § 7107 (West 1988 & Supp. 1996); S.C. CODE ANN. §§ 59-102-10 to 59-102-50 (Law. Co-op. 1976 & Supp. 1995); TEX. [STAT.] & CODES ANN. tit. 132, §§ 8871 et. seq. (West 1987 & Supp.

## III. ETHICAL CONSIDERATIONS

Notwithstanding the lack of regulation by the IOC, IFs, NGBs and other Olympic organizations,<sup>61</sup> an attorney representing an Olympic athlete, unlike an agent,<sup>62</sup> is subject to the applicable rules of professional conduct<sup>63</sup> enacted by his or her licensing state.<sup>64</sup> Ethical considerations apply to the representation of an athlete whether the representing attorney acts as the athlete's attorney or agent.<sup>65</sup> Different from an agent, an attorney must always zealously

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1996); WASH. REV. CODE ANN. tit. 18, §§ 18.175-010. to 18.175-080. (West 1989 & Supp. 1996). Because some either include or exclude attorneys from their provisions, an attorney seeking to serve as an agent for an Olympic athlete should consult the provisions promulgated, if any, by his or her state of practice.

61. Unlike the National Football League Players Association (NFLPA), National Basketball Players Association (NBPA), Major League Baseball Players Association (MLBPA) and National Hockey League Players Association (NHLPA), neither the IOC, the IFs, nor the NGBs regulate or register agents representing Olympic athletes. The NFLPA, NBPA, NLBPA and NHLPA require player agents to execute standard representation agreements. See NFLPA Standard Representation Agreement between Contract Advisor and Player and NBPA Standard Player Agent Contract, *reprinted in* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS (Gary A. Uberstine ed., 1994). The regulations of these Player Associations impose strict limitations on fees, regulate who can become player agents, and provide arbitration mechanisms for resolution of conflicts. See generally NBPA REGS, *reprinted in* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS (Gary A. Uberstine ed., 1994).

62. The *Restatement of Agency* defines an agent as "one who acts for or in the place of another by authority from him" or "a person who represents another in contractual negotiations," or "a business representative whose function is to bring about, modify, effect . . . contractual obligations between the principal and third persons." RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

63. For purposes of discussion, this Article refers to the *ABA Model Rules of Professional Conduct*, as adopted by the American Bar Association. MODEL RULES OF PROFESSIONAL CONDUCT (1995) [hereinafter MODEL RULES]. Most states adopt these Rules or impose variations upon these Rules. See *id.* An attorney seeking to guide his professional conduct, however, must always look to the code enacted in his or her specific jurisdiction. *Id.*

64. These rules do not establish the basis for civil liability, but provide guidelines for practice. These rules also provide a structure for disciplinary action by the applicable state disciplinary agency. See *id.*

65. "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." *Id.*; see also *id.* Rule 5.7. Rule 5.7 provides:

*Rule 5.7 Responsibilities Regarding Law-Related Services*

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

represent the interests of the client-athlete and heed the utmost ethical standards in his or her actions.<sup>66</sup>

#### A. The Model Rules of Professional Conduct Background

On August 2, 1983 the American Bar Association House of Delegates adopted the Model Rules of Professional Conduct (Model Rules).<sup>67</sup> These Model Rules, as enacted, in whole or part, by most state bar associations or disciplinary boards<sup>68</sup> set forth the rules of reason under which an attorney should practice.<sup>69</sup> An attorney failing to abide by these Model Rules may be subject to state disciplinary action and loss of licensure.<sup>70</sup> "Some of the Rules are imperatives, cast in terms of 'shall' or 'shall not' . . . others, generally cast in the term of 'may' or 'should,' are permissive and define areas under the Rules in which the lawyer has professional discretion."<sup>71</sup>

#### B. The Specific Rules of Professional Conduct to Consider in the Attorney/Agent-Client Relationship

The following discussion is a sampling of the Model Rules as they may apply to the attorney as agent (attorney-agent) scenario. Any attorney-agent representing an Olympic athlete should consult the applicable rules of conduct adopted by his or her state of licensure. Other than existing state statutes regulating "agents,"<sup>72</sup> these rules of conduct provide the only guide for the attorney-agent in

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(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

*Id.*

66. *Id.* Rule 1.3 cmt. [1] ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.")

67. *Id.*

68. Although every state had adopted the predecessor *Model Rules* in some form, not every state amended its rules for professional responsibility following the enactment of the 1983 Rules. STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 1995 xv (1995). As of fall 1994, approximately 38 states, along with the District of Columbia, have adopted many or all of the Rules. *Id.* at xvi. Several states, mainly California, New York, Oregon and Vermont, have rejected the Rules, incorporating only modest portions into their state code. *Id.*

69. See MODEL RULES, *supra* note 63, Scope.

70. See *id.* Rule 8.4.

71. *Id.* Scope.

72. For a list of the state statutes which currently regulate agents, see *supra* note 60.

determining his or her course of conduct in the representation of the Olympic athlete.

### 1. *Scope of Representation*

The Olympic athlete, with the assistance of the attorney-agent, should set the scope of the attorney's representation at the time the attorney is initially retained.<sup>73</sup> It is essential for both the attorney-agent and the Olympic athlete to clearly understand the terms of the engagement. These terms should be reduced to a written agreement setting forth the specific services to be provided by the attorney-agent and the fees for such services.<sup>74</sup> Thereafter, the attorney-agent is obligated not to exceed the boundaries of the engagement without the Olympic athlete's consent.<sup>75</sup> If another professional is retained to assist in the Olympic athlete's representation,<sup>76</sup> it is imperative that the agreement spell out who is responsible for their expenses and how they will be paid.<sup>77</sup>

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73. MODEL RULES, *supra* note 63, Rule 1.2 (c) (stating "A lawyer may limit the objectives of the representation if the client consents after consultation."). The services to be performed are best outlined in a representation agreement and in some states, such agreements are mandatory. See CAL. LAB. CODE §§ 1500-1547 (West 1989 & Supp. 1996). These agreements generally outline the services for which the attorney is retained, the time-period for providing those services, and the fees to be billed. See *id.* Some representation agreements go as far as to provide support services, fan mail management, travel services and bill management to the Olympic athlete. For a discussion of provisions suggested for representation agreements, see *infra* notes 135-71 and accompanying text.

74. MODEL RULES, *supra* note 63, Rule 1.2 cmt. [4]-[5].

75. *Id.* Rule 1.2 cmt. [1]. "A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued." *Id.* Rule 1.2 (a).

76. For example, if a financial planner is to be consulted for investment advice, the responsibilities and method of remuneration for this individual should be delineated in the representation agreement. Similarly, if a coach is retained to assist the Olympic athlete's preparation for the competition and compliance with the competition's rules, the coach's responsibilities related to the monitoring of competition rule compliance should be incorporated into the contract.

77. By way of example, it is common for an attorney-agent to agree to hire a commercial agency, for the athlete's benefit, to solicit endorsement opportunities. Sometimes the agency's fees are paid for out of the attorney's fees, and other times the athlete is directly responsible for these fees which usually consist of a percentage of the gross value of the endorsement. Whichever method of payment to the agency is selected, this method should be delineated in the representation agreement. MODEL RULES, *supra* note 63, Rule 5.4. Rule 5.4 expressly limits the attorney's ability to share fees paid for legal advice with non-lawyers. *Id.* ("a lawyer . . . shall not share legal fees with a nonlawyer").

## 2. Competence

An attorney is obligated to provide his or her client with competent representation.<sup>78</sup> For an attorney representing an Olympic athlete, competent representation includes knowledge and understanding of the rules and regulations governing the Olympic athlete's sport, especially the rules dealing with the athlete's eligibility.<sup>79</sup> Hence, this representation will include a working knowledge

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78. *Id.* Rule 1.1. Rule 1.1, entitled "Competence" provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* The comment to this rule explains,

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

*Id.* Rule 1.1. cmt. [1]. The Comment further delineates that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." *Id.* Rule 1.1. cmt. [5]. Competence in the representation of an Olympic athlete requires more than knowledge of the law, it requires knowledge and understanding of sport regulations and politics as well. See SHUBERT, *supra* note 56, at 128 (stating competence on part of agent requires "understanding of the sport, its management, and its business aspects"). In this context, competency would certainly require an attorney to be familiar with the structure of the Olympic Movement and the rules promulgated by the entities within the Olympic Movement. See *id.* Particularly, the attorney-agent should be familiar with the structure and rules of the IF and NGB for the sport of the athlete the attorney is representing.

79. While the *Model Rules* do not require actual knowledge of a particular field in order to prove competence, the *Model Rules* do indicate that preparation and study may be required to establish competence in a particular area of practice. MODEL RULES, *supra* note 63, Rule 1.1 cmt. [1]. In the representation of an Olympic athlete, competent representation requires familiarity with IF and NGB competition and eligibility rules. Unfamiliarity with these rules may be considered gross negligence. See SHUBERT, *supra* note 56, at 128 (stating competence on part of agent requires "understanding of the sport, its management, and its business aspects" and declaring "failure to act with that degree of competence might subject the agent to a negligence or related claim by an athlete"). If an Olympic athlete is deemed ineligible for failing to comply with any IF or NGB rules, that athlete may lose his or her sole chance at a gold medal. Cf. Peter Schmuck, *A Turn for Worst for USC's Quance*, L.A. TIMES, Mar. 7, 1996, at 1 (discussing U.S. Swimming's Olympic hopeful Kristine Quance's disqualification for minor technical violation "of a confusing and vague rule" in recent 1996 Olympic trials). Equally disturbing, if an Olympic athlete is denied the ability to compete in the Olympic Games for failing to comply with competition rules, or is denied eligibility for an Olympic Games for failing to abide by the NGB guidelines, the athlete's ability to realize commercial sponsorship may be severely limited, if not eliminated. See, e.g., Anxthelm *supra* note 39, at 55 (noting substantial endorsement contracts lost by Ben Johnson following his disqualification from 1988 Olympic Games held in Seoul, South Korea). The competent attorney-agent, therefore, will know these rules and advise the Olympic athlete to strictly abide them.



of the rules and regulations of the Olympic athlete's NGB and IF,<sup>80</sup> the IOC and possibly, the NCAA.<sup>81</sup> Moreover, an attorney-agent representing an Olympic athlete who wishes to capitalize on his or her athletic ability through commercial endorsements and media contracts owes the Olympic athlete the skill and knowledge necessary to competently handle these negotiations. Such endorsements and contracts involve complex areas of knowledge, and the complexity may increase when an Olympic athlete is involved.<sup>82</sup> Com-

80. It is especially important for the attorney-agent to remain on a cordial and professional level with the federations governing the Olympic athlete, as the scoring of many of these competitions have a subjective edge. See Mike Downey, *Winter Olympics: Notebook*, L.A. TIMES, Feb. 10, 1994, at 7 (noting published reports following U.S. Championships claimed Tonya Harding scores were lowered by certain judges because her sleeveless, v-neck costume bared much skin); Randy Harvey, *Winter Olympics' Thomas' Coach Fears Judges Minds Made Up*, L.A. TIMES, Feb. 26, 1988, at 1 (discussing speculation by coach that judges "decided who would win the gold medal before they arrived" after Debbie Thomas placed second to Katarina Witt in early phases of women's figure skating competition). For example, in ice skating and gymnastics, although there is technical merit attributed to technical moves, the overall scoring and placement of the athlete is measured subjectively. *Id.* See generally Harvey, *supra*, at 1. The narrowest of margins may mean the difference between winning and losing. See Randy Harvey, *Lillehammer Jumps' Glitter Isn't Gold*, L.A. TIMES, Feb. 27, 1994, at 1. (noting in 1992 Olympics, Oksana Baiul won Gold Medal over Nancy Kerrigan by slim margin and briefly discussing controversy surrounding scores). Furthermore, the failure of an attorney-agent to be conversant in the Olympic athlete's sport - understanding at the least how competitions are scored - may reflect adversely on the athlete. It is not worth jeopardizing an Olympic athlete's standing within his or her NGB and IF, particularly when most associations have the ability to improve the visibility of an Olympic athlete by sending that athlete to various national and international competitions. See 1994-1995 USFSA RULEBOOK, SKATING REGULATIONS (1994) (ISU is ultimate determiner of athletes' ability to participate in sanctioned events outside Olympic Games).

81. The attorney-agent should periodically review these rules for amendments to eligibility or competition requirements. The attorney-agent should also be cognizant that eligibility requirements for the Olympic athlete may vary depending on the rules studied. *Cf.*, e.g., NCAA REGULATIONS and USA BASKETBALL REGULATIONS (demonstrating that Olympic athletes may receive compensation and still be eligible for Olympics, though not for NCAA basketball). The attorney-agent must insure that the Olympic athlete does not enter into a contract or agreement which would jeopardize the athlete's ability to compete in any way. See, e.g., *Katarina Witt-The East German Who is More Equal Than Others*, L.A. TIMES, Feb. 2, 1986, at 10 (stating Witt received \$4 million proposal to sign with professional skating association following Gold Medal, but failing to note acceptance of offer would end future Olympic competition).

82. The attorney-agent must place the athlete's eligibility to compete above all other concerns. Therefore, the attorney-agent must analyze every commercial opportunity presented to the athlete to insure, if accepted, that opportunity will not, due to its breadth of application, limit or eliminate the Olympic athlete's ability to compete. When informing the Olympic athlete of potential promotional contracts, the attorney-agent should fully disclose to the athlete all of the options available and the potential risks involved. MODEL RULES, *supra* note 63, Rule 2.1. The attorney-agent must explain that the Olympic athlete should be selective when accepting product endorsement contracts - accepting only those endorsements which will assist the athlete in creating or maintaining an image consistent with his

petence in the areas of endorsements and media contracts may depend on knowledge of other deals, knowledge of general industry standards and possibly an awareness of other regulations binding the Olympic athlete's conduct.<sup>83</sup> Because the attorney-agent may not possess the requisite familiarity with these types of commercial transactions, it may be necessary for the attorney to seek the assistance of an expert to insure that competent counsel is given.<sup>84</sup>

### 3. *Diligence*

Upon undertaking to represent an Olympic athlete, the attorney-agent should proceed with commitment and dedication to the Olympic athlete.<sup>85</sup> The attorney-agent must, therefore, render his or her professional services diligently and promptly.<sup>86</sup> Since most Olympic athletes have a small window of opportunity in which to benefit from their athletic prowess, it is important not to delay the pursuit of commercial opportunities for that athlete.<sup>87</sup> Any delay

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or her long-term goals. See Pamela R. Lester, *Marketing the Athlete; Endorsement Contracts*, in 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS 23-1, 23-4 to 23-6 (Gary A. Uberstine ed., 1994). Armed with this information, it is then up to the Olympic athlete to determine whether he or she will risk eligibility or seek to take advantage of the commercial opportunity. MODEL RULES, *supra* note 63, Rule 2.1.

83. Cf. Lester, *supra* note 82, at 23-6 (noting need to determine all constraints upon athlete before entering contract negotiations). For example, as many federations are now competing with Olympic athletes for the same commercial dollars, some federations have attempted to tie their competing athletes to their commercial endorsements in order to avoid any conflict within the sport. Cf. Morrow, *supra* note 29, at 270 (describing Campbell Soup deal with ISU through which several athletes are bound to appear in unpaid promotional appearances). Moreover, if the Olympic athlete is also a professional athlete for the NHL, NFL, NBA or MLB, uniform player contracts and collective bargaining agreements should be consulted to determine whether any additional restrictions on the athlete's ability to endorse products or services exist. *Id.* For a discussion of possible restrictions on a professional athlete's ability to endorse products or services, see Lester, *supra* note 82, at 23-4 to 23-6.

84. MODEL RULES, *supra* note 63, Rule 1.1 cmts. [1]-[5]. The attorney-agent may seek assistance from an expert in order to ascertain the value of an offer to an Olympic athlete. *Id.* Rule 1.6 cmt. [20]. For example, the attorney-agent may need the expert to perform credit checks or other investigation into a promoter before an Olympic athlete is advised to accept an endorsement deal. In such a situation, the attorney-agent may need to disclose limited information surrounding the offer to the expert. See *id.* Rule 1.6 cmt.

85. *Id.* Rule 1.3 (stating that "[a] lawyer shall act with reasonable diligence and promptness in representing a client.").

86. *Id.*

87. Most Olympic athletes compete in only one Olympic Games. See WELS, *supra* note 5, at 162-77 (listing Winter and Summer Olympic Gold Medalists, but enumerating very few names more than once). Hence, it is unusual for them to have more than a two year window of opportunity for commercial endeavors. Oc-

may result in the loss of thousands of dollars for the Olympic athlete and a malpractice claim against the attorney-agent.<sup>88</sup>

#### 4. *Communication*

The representation of an Olympic athlete is a personal relationship, in which the attorney-agent's most important role is as a communicator.<sup>89</sup> Most Olympic athletes will consume themselves with training and preparation for the Olympic Games and will not spend the necessary time and energy to keep informed of daily developments in commercial and endorsement opportunities or other financial matters.<sup>90</sup> The attorney-agent must routinely advise an Olympic athlete of the status of all affairs in which the attorney represents the athlete. Such advice is particularly important when the Olympic athlete is seeking commercial opportunities. Even when the Olympic athlete delegates authority to the attorney-agent to negotiate endorsement or other contracts, the attorney-agent must inform the Olympic athlete of any and all offers, inquiries and developments as they arise.<sup>91</sup> In conveying the information, the attorney-agent should explain the opportunity or development to the Olympic athlete in as much detail as necessary to fully inform the athlete of his or her options.<sup>92</sup> The attorney-agent must advise the Olympic athlete of all considerations which will help the athlete make a reasonable decision whether to accept or reject the offer.<sup>93</sup>

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casionally, however, an athlete like Greg Luganis comes along who has the skill and stamina to compete, and win, in several Olympic Games. *See id.*

88. *See* MODEL RULES, *supra* note 63, Rule 1.3 cmt.[2] (stating that "[p]erhaps no professional shortcoming is more widely resented than procrastination.").

89. It is extremely important for the attorney-agent to keep the Olympic athlete, or his or her guardian, well-apprised of any and all commercial opportunities, contracts or other related matters. *See id.* Rule 1.4. The attorney-agent should not assume the right to make decisions for the Olympic athlete. *See id.*

90. Crandall, *supra* note 57, at 816 n.9 (stating that "many athletes are not as aware as they should be of financial opportunities away from the playing field") (citing Golenbach, *Now Calling All Signals, The Lawyer-Agent*, JURIS DR., Oct. 1971, at 49).

91. MODEL RULES, *supra* note 63, Rule 1.4. This rule, entitled "Communication," states that "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*

92. *Id.* Rule 1.4 cmt. [1] (stating that "[a] lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party."). This obligation heightens if the athlete is a minor. *Id.* Rule 1.4 cmt. [3].

93. *Id.* Rule 1.4(b).

An attorney-agent may *not* withhold information which serves his or her own interest or convenience.<sup>94</sup>

### 5. *Effective Advising*

The attorney-agent relationship defies normal legal boundaries. An attorney-agent's role when representing an Olympic athlete may include giving advice to the Olympic athlete in areas ranging from contract pricing to costume design.<sup>95</sup> The advice needed may not require legal research or interpretation. The attorney-agent is required to draw upon personal knowledge and experience and to exercise independent professional judgment in counseling the client, even if these consultations do not require expert legal opinion.<sup>96</sup> In all circumstances, the attorney-agent's advice should be direct and honest.<sup>97</sup>

### 6. *Confidentiality of Information*

Any non-public information revealed to an attorney-agent representing an Olympic athlete shall not be revealed to any other person without the consent of the athlete.<sup>98</sup> Any business relationship involves a great probability of receiving information that may be of

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94. *Id.* Rule 1.4 cmt. [4] (stating that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience.").

95. Surprisingly, an Olympic contender's costume may spurn controversy if other individuals, whether involved in the Games or not, find the costume shocking. See, e.g., Mike Downey, *Winter Olympics: Notebook*, L.A. TIMES, Feb. 10, 1994, at 7 (noting that Katarina Witt's costumes were criticized as "unduly provocative"); David Dykstra, *For a Short Program, a Short Costume*, L.A. TIMES, Mar. 5, 1988, at 3 (commenting that "[a]fter viewing Katarina Witt's short program and her even shorter costume, I can state that brevity is the soul of Witt"); Mike Kupper, *Winter Olympics Notes Decision to Give Gault Yet Another Chance Renews Controversy*, L.A. TIMES, Feb. 25, 1988, at 8 (declaring that "Katarina Witt may attract less attention for her performance in . . . figure skating short program for what she is wearing or what she isn't wearing. Her costume leaves little to the imagination" and discussing Witt's reaction to costume controversy); see also Randy Harvey, *For Trenary, It Figures to Be a Skater's Waltz*, L.A. TIMES, Feb. 8, 1989, at 1 (noting ISU passed edict eliminating unitards, like that worn by Debbie Thomas; plunging necklines, like those composing Katarina Witt's costumes and non-covering bottoms, like those paginated by Jill Trenary).

96. MODEL RULES, *supra* note 63, Rule 2.1. Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.*

97. *Id.* Rule 2.1 cmt.

98. *Id.* Rule 1.6. Rule 1.6, entitled, "Confidentiality of Information," provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

interest to another client, or to other individuals.<sup>99</sup> Confidentiality of the information is crucial to the success and longevity of the relationship between the attorney-agent and the Olympic athlete.<sup>100</sup>

### 7. Safekeeping Property

If the attorney-agent is to handle the Olympic athlete's finances, the authorized use of the Olympic athlete's funds should be specifically described to the Olympic athlete before the services are rendered.<sup>101</sup> Further, records of any and all transactions on behalf of the Olympic athlete should be accurately kept.<sup>102</sup> If an attorney-agent holds or receives property from an Olympic athlete whom he or she represents, such property must be segregated and appropriately safeguarded.<sup>103</sup> In an athlete-agent context, for example, the attorney-agent often receives payments on behalf of his

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(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

*Id.*

99. See generally *id.* Problems can arise for the Olympic athlete when information and potential promotional opportunities for the Olympic athlete are revealed before the athlete finalizes the deals. See, e.g., Dan Geringer, *A Better Deal This Time?*, SPORTS ILLUSTRATED, Sept. 14, 1988, at 22 (stating problems arose in negotiations of several anticipated contract deals after Carl Lewis' agent, Joe Douglas, made several "off-cuff comments" and discussed major endorsement deals which were yet unsigned).

100. MODEL RULES, *supra* note 63, Rule 1.6 cmt. [4] (stating that "[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of the information relating to the representation.").

101. *Id.* Rule 5.7 (defining law-related services and declaring "a lawyer shall be subject to [the Model Rules] with respect to the provision of [these] services").

102. *Id.* If the attorney-agent does not have the necessary background to perform these services adequately, he or she must advise the athlete and/or his or her parents and, if possible, recommend competent alternatives to them. *Id.*

103. *Id.* Rule 1.15(a). This rule, entitled "Safekeeping Property," states: (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of (five years) after termination of the representation.

*Id.*

or her client, particularly from the Olympic athlete's endorsement contracts; such funds must *not* be commingled with funds of the attorney-agent and shall be kept separate until distribution and an accounting is provided.<sup>104</sup> Upon receipt of funds the attorney-agent must notify the Olympic athlete immediately and promptly deliver to the athlete those funds which the athlete is entitled to receive.<sup>105</sup> The failure to safeguard an Olympic athlete's property is a clear violation of the attorney-agent's fiduciary duty.<sup>106</sup>

## 8. *Conflict of Interest - General Rule*

An attorney-agent must not represent an Olympic athlete if that representation is directly adverse to the representation of any other client, or if that representation will constrain the attorney's duties to another client, unless the attorney-agent reasonably believes the representation will not adversely affect the representation of the other client.<sup>107</sup> Even if the attorney-agent believes that the

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104. *Id.* Rule 1.15(c). Rule 1.15 (c) states:

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of the interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

*Id.*

105. MODEL RULES, *supra* note 63, Rule 1.15(b). Rule 1.15(b) provides:

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

*Id.*

106. *Id.* Rule 1.15 cmt. Attorneys have been sanctioned for inadvertent misappropriation and misappropriation which resulted in no harm to the client. *Id.*

107. *Id.* Rule 1.7. Rule 1.7, entitled "Conflict of Interest: General Rule," states:

(a) A lawyer shall not represent a client if the representation of the client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and

- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

dual representation will not adversely affect the Olympic athlete and the other client, both the athlete and the other party must be informed of the potential for conflicted interests and both must consent to the dual representation after consultation despite this knowledge.<sup>108</sup>

The potential for conflict in the representation of an Olympic athlete exists in several instances. For example, an attorney-agent may be requested to represent the athlete, the coach and the athlete's parents.<sup>109</sup> Similarly, a conflict may arise if the attorney-agent chooses to represent more than one Olympic athlete who performs in the same sport.<sup>110</sup> The attorney-agent may also have an opportunity to represent the Olympic athlete's gym or club.<sup>111</sup> Despite any initial appearances that these aforementioned parties may have similar interests, conflicts may still arise after representation has begun.<sup>112</sup> The attorney-agent must make an initial evaluation of the

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*Id.*

108. *Id.*

109. To illustrate, conflict may arise when an attorney-agent agrees to represent the Olympic athlete and his or her coach or his or her parents. If a dispute arises between the Olympic athlete and the coach, or the Olympic athlete and his or her parents, during that athlete's training and preparation for the Olympic Games, the attorney-agent may be forced to withdraw from the representation of both clients. See *id.* Rule 1.7 cmt. [2] (noting attorney should withdraw from representation if conflict arises in which representation will be materially limited by attorney's responsibility to client or third person); *id.* Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."). But see *id.* Rule 2.2 (lawyer may act as intermediary if clients consent after consultation and such consent is reasonable).

110. Representing more than one Olympic athlete who compete in one sport may lead to conflicts, for example, when the attorney-agent is negotiating endorsement contracts. If a particular corporation is not seeking a specific Olympic athlete, but rather is simply looking for any athlete from a particular sport to endorse its product, an attorney-agent who represents more than one athlete in that sport will have difficulty zealously representing each athlete's interests. In such a case, the attorney-agent may be forced to withdraw from the representation of both athletes. See MODEL RULES, *supra* note 63, Rule 1.7. Further, if questions arise concerning the scoring of an event when one client-athlete loses the gold medal but the other client-athlete wins, the attorney-agent may be forced to withdraw from representing either athlete. *Id.*

Even if real conflicts of interest do not arise, the attorney-agent may experience difficulty in representing more than one Olympic athlete if an athlete perceives that another athlete is being favored. *Id.*

111. This dual representation could cause a problem, for example, if the Olympic athlete is injured on the gym's premises and must sue for damages. See *id.* (dealing with conflict of interest).

112. In many instances, another party may request to pay for the legal services provided to the Olympic athlete, particularly if that Olympic athlete is a minor. This type of financial arrangement is permissible if the Olympic athlete consents and the attorney remains uninfluenced by the payor. *Id.* Rule 1.7 cmt. [10] ("A

feasibility of any such dual representation, based upon his or her personal knowledge at the moment that the dual-representation is requested and what he or she reasonably believes will happen in the future.<sup>113</sup> If the attorney-agent is disqualified from representing the Olympic athlete due to a conflict of interest, the attorney-agent's firm may also be disqualified.<sup>114</sup>

### 9. *Conflict of Interest - Prohibited Transactions*

An attorney-agent may "not enter into a business transaction with [an Olympic athlete] or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to [that athlete] unless" the transaction is fair and reasonable; the athlete is fully advised of the ramifications of the transaction; the athlete has been given the opportunity to obtain independent counsel; and the athlete has consented in writing.<sup>115</sup> Often the representation of Olympic athletes includes the negotiation of business transactions

lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.").

113. *Id.* Rule 1.7 cmts. [11]-[14]. Comment [11] notes:

Conflicts of interests in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

*Id.* Rule 1.7 cmt. [11].

114. *Id.* Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [the Model Rules]."). This disqualification could continue even after the attorney-agent leaves the firm. *See id.* Rule 1.10(b).

115. MODEL RULES, *supra* note 63, Rule 1.8(a). Rule 1.8(a), entitled "Conflict of Interest: Prohibited Transactions," states:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.



in which the attorney-agent may participate either in lieu of fees or otherwise. These business transactions include promoting events, selling book rights or lining up sponsors. In any of these circumstances, it is imperative that the attorney-agent fully disclose to the Olympic athlete any and all remuneration the attorney-agent will receive from any source, together with other terms and conditions of the proposed transaction.<sup>116</sup>

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon the consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

*Id.* Rule 1.8 cmt. [3] ("Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j)").

116. *Id.* Rule 1.4. In today's marketplace it is not uncommon for the agent to represent the athlete and the agent's company to sponsor the event and sell the

# 10. Representation of Minor Athletes

An attorney-agent's obligation to properly advise and consult with his or her Olympic client-athlete is not altered by the Olympic athlete's disability, including his or her minority status.<sup>117</sup> Many successful Olympic athletes are minors, in particular female gymnasts and figure skaters.<sup>118</sup> Representing these Olympic athletes may present special problems not faced when representing Olympic athletes who are of majority.<sup>119</sup> At all times, the attorney-agent must insure that the Olympic athlete's wishes, and not those of the parents or coaches, are followed - even if that Olympic athlete is a minor.<sup>120</sup>

When undertaking the representation of a minor athlete, the attorney-agent must be cognizant that the law provides special protection for a minor athlete. For instance, a minor, upon coming of

sponsorship and television time for the event. The resulting conflicts may be harmful to the Olympic athlete. See *id.* Rule 1.8.

117. *Id.* Rule 1.14 cmt. [2] (declaring that "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."). Rule 1.14, entitled "Client Under a Disability," states:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

*Id.* Rule 1.14 (emphasis added).

118. For example, Michele Kwan, the current U.S. National Figure Skating Champion, and member of the 1994 U.S. Olympic Team, is only 15 years old. Steve Wilstein, *Pure Perfection: 15-year-old American Skater Already on the Cusp of Greatness*, ROCKY MTN. NEWS, Mar. 24, 1996, at 22B. Minor athletes from all countries are seemingly abundant in the Games. In the 1992 Olympic Games held in Barcelona, the Unified Team's competitor and winner of the Gold Medal in the all-around women's gymnastics competition, Tatiana Gutsu, was only 15 at the time. WELS, *supra* note 5, at 81. Similarly, Ukrainian figure skating Gold medalist, Oksana Baiul, was also only 16 when she scored above Nancy Kerrigan to take the 1994 gold medal in the women's figure skating competition. *Id.* at 120. Even more amazing, Nadia Comaneci, the Romanian gymnast who scored an "unheard-of seven perfect 10's, three golds, a silver and a bronze" in the 1976 Olympic Games in Montreal, was only 14 at the time. *Id.* at 60.

119. See Stephen M. Carlisle & Richard C. Wolfe, *Florida's New Child Performer and Athlete Protection Act: Or What to Do When Your Client is a Child, Not Just Acting Like One*, FLA. B.J., Nov. 1995, at 93.

120. MODEL RULES, *supra* note 63, Rule 1.14 cmt. [2]. As stated in Rule 1.14 comment 2:

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. . . . Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of a client, particularly in maintaining communication.

*Id.*

the age of majority,<sup>121</sup> may disaffirm a contract possibly without any requirement of restitution.<sup>122</sup> The attorney-agent must beware of this possibility when negotiating endorsements and appearances for the athlete. The attorney-agent must also beware of state statutes which may nullify contracts signed by parents or guardians on behalf of the minor without court approval.<sup>123</sup> Moreover, the attorney-agent must take preventive measures to ensure that capital earned by the minor Olympic athlete is preserved for his or her future use.<sup>124</sup>

## 11. Fees

A prominent distinction between attorney-agents and non-attorney-agents in the representation of Olympic athletes is the manner in which their fees are determined.<sup>125</sup> Agents' fees are usually charged based on a percentage of the income generated for the athlete, unless statutory restrictions prohibit such fee schedules.<sup>126</sup> Attorney-agents, on the other hand, generally bill on an hourly or flat fee basis. Unlike agents who often have no restraints prohibiting methods of billing and fees unless a state statute exists specifically imposing such restraints or a regulatory body for the sport imposes an internal regulation prohibiting certain billing methods, attorney-agents are constrained by the Model Rules to ensure their fees are reasonable.<sup>127</sup> Whether a fee charged to an Olympic client-athlete is reasonable will vary with the circumstances and is gener-

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121. The age of majority is determined by the law of the applicable state.

122. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. C (1981); *see also* RESTATEMENT (SECOND) OF AGENCY § 20 (1958) ("The contract of an infant to employ an agent is voidable by him, as is any contract made for him by such agent . . ."). Some states have altered this by statute. *See, e.g.,* CAL. FAMILY CODE § 6712 (West 1994); FLA. STAT. ANN. § 743.08.3(a) (West 1986 & Supp. 1996); N.Y. ARTS & CULT. AFF. LAW § 35.03.1 (McKinney 1996).

123. *See, e.g.,* CAL. FAMILY CODE § 6751; FLA. STAT. ANN. §§ 743.08-743.09; N.Y. ARTS & CULT. AFF. § 35.03.1.

124. *See* MODEL RULES, *supra* note 63, Rule 1.15.

125. SHUBERT, *supra* note 56, at 130 (stating agents generally receive payments in one of four ways: by hour; by flat rate; by salary percentage; or by combination of preceding methods).

126. Fox, *supra* note 60, at 1231 (stating most agents regularly charge between six and ten percent of athlete's earnings but declaring some agents have been successful in charging up to twenty-five percent of athlete's negotiated contract). Some states regulate the amount of percentage which an agent or an attorney acting as agent may legally receive from a client. *See, e.g.,* CAL. LAB. CODE § 1531(b) (West 1994) ("no athlete agent shall collect a fee in any calendar year which exceeds 10 percent of the total compensation"). Further, the NFL, NBA, NHL and MLB regulate rates agents can receive from professional athletes. *See, e.g.,* NBPA Regulations (1995).

127. *See* MODEL RULES, *supra* note 63, Rule 1.15 (regulating attorneys' fees).

ally determined by examining several factors, including the time and effort involved, the novelty of the issue, the experience and knowledge of the attorney, and the results obtained.<sup>128</sup> An attorney-agent may negotiate a contingent fee arrangement with the Olympic athlete, provided the fee is reasonable by the aforementioned standards.<sup>129</sup> No matter what method of billing the Olympic athlete selects, the attorney-agent must communicate the basis for the fees to the Olympic athlete "before or within a reasonable time after commencing representation."<sup>130</sup>

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128. *Id.* Rule 1.5(a). Rule 1.5(a), entitled "Fees," states:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

*Id.*

129. *Id.* Rule 1.5(c). Rule 1.5(c) provides:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

*Id.* The attorney-agent cannot, however, negotiate a contingent fee arrangement with the Olympic athlete when representing him or her in a divorce or criminal matter. *Id.* Rule 1.5(d). Rule 1.5(d) states:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

*Id.*

130. *Id.* Rule 1.5(b). Rule 1.5(b) declares, "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." *Id.* Further, Rule 1.5(e) states:

(e) A division of fee between lawyers who are not in the same firm may be made only if:

## 12. *Solicitation and Advertising*

Unlike a non-attorney agent who may actively approach an athlete seeking to be retained to negotiate the athlete's commercial enterprises and maintain the athlete's finances,<sup>131</sup> an attorney-agent may not actively solicit representation of or contractual arrangements with Olympic athletes.<sup>132</sup> An attorney-agent desiring to market his or her abilities as an attorney-agent has only a limited ability to advertise his or her services through the public media.<sup>133</sup> The attorney-agent is therefore forced to rely on his or her ability and competence in the field, with the garnishing hope that the competent and successful representation of one Olympic athlete will lead to the representation of other Olympic athletes. Despite the limited ability to advertise and the need to depend on his or her own reputation in order to expand the number of Olympic athlete-clients one individual represents, an attorney-agent should never pay any fees or remuneration to someone who recommends the attorney to an Olympic athlete.<sup>134</sup> Although it may be tempting for the attorney-agent to offer an inducement to a coach or parent in order to obtain an Olympic athlete as a client, particularly when those coaches or parents have personal contact with other competing athletes, doing so is clearly prohibited by the Model Rules.<sup>135</sup>

## IV. THE REPRESENTATION AGREEMENT

In any circumstance, an attorney-agent initiating a relationship with a new client would be foolish to do so without a written representation agreement. The representation agreement between an Olympic athlete and an attorney-agent - whether the attorney is acting also as agent or simply as legal counsel - requires special consideration. Unlike the typical fee letter published by most law firms,<sup>136</sup>

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(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

*Id.* Rule 1.5(e).

131. Crandall, *supra* note 57, at 831 ("The distinction between lawyer and non-lawyer agents becomes critical in light of the fact that the solicitation efforts of non-lawyer agents are perhaps the most flagrant examples of unscrupulous conduct.").

132. MODEL RULES, *supra* note 63, Rule 7.2 (Advertising).

133. *Id.* Rule 7.2(a).

134. *See id.* Rule 7.2(c).

135. *See id.*

136. The following is representative of a sample fee agreement:

an agreement with an Olympic athlete must anticipate situations not usually encountered in other attorney-client relationships. The nuances peculiar to an attorney-agent's representation of an Olympic athlete should be given special consideration when drafting the representation agreement.

### A. Identifying the Parties

Agreements characteristically begin with a brief recital describing the parties<sup>137</sup> to the agreement.<sup>138</sup> The drafting of such a reci-

Dear —:—:

Thank you for retaining us to represent you in the [DESCRIBE MATTER].

The Rules of Professional Conduct provide that the basis or rate of the fee shall be communicated to the client, in writing. This letter is intended to be that written communication.

1. *BASIS OF THE FEE.* The minimum fee will be based on the time charges of all professionals (attorneys and paralegal assistants) working on your matter. Each professional charges at his assigned hourly rate which may change from time-to-time. If our representation of you ends before the conclusion of your case, you will be responsible for all time charges and costs incurred up to the termination.

2. *COSTS.* You will be responsible for all out-of-pocket costs and expenses incurred on your behalf, including but not limited to filing fees, photocopies, appraisal costs and long distance telephone calls. We may ask that you advance the money for those costs and expenses.

3. *TIME RECORDS.* Each professional keeps a daily record of the time expended on each case, which includes the activities undertaken on your behalf, including your initial interview, consultations, correspondence, preparation of documents, court appearances and telephone calls, etc. Time charges are recorded in minimum units of one tenth of an hour. Our time records in your matter are available for your inspection at your request.

4. *BILLING.* We will send you a monthly invoice reflecting your fees and costs to a given date. We may suspend our activity in any case, where outstanding balances are more than thirty (30) days overdue, unless other arrangements for payment have been agreed to in writing, and we reserve the right to terminate our attorney-client relationship for non-payment of fees or costs.

Would you please sign, date and return to me the extra copy of this letter which is enclosed, indicating that you have read it and signifying your approval of its terms and conditions. If there are any questions whatever with respect to the legal fees and expenses that you will be incurring in our representation of you, do not hesitate to call or arrange to meet with us.

Of course, please feel free to consult any attorney of your choice in connection with, and before you agree to, the fee arrangement set forth in this letter.

Very truly yours,

Dated: July XX, 19XX

137. Section 9 of the *Restatement of Contracts* provides that, "[t]here must be at least two parties to a contract, a promisor and a promisee, but there may be any greater number." *RESTATEMENT (SECOND) OF CONTRACTS* § 9 (1981).

138. A typical initial recital is "THIS AGREEMENT made [date] by and

tal presumes that the drafter knows the identity of the parties. This may not be the case. While the identity of the athlete is known, that person may not have the legal capacity to contract.<sup>139</sup> In certain jurisdictions,<sup>140</sup> a guardianship proceeding may be required to designate the proper and lawful contracting party. The penalties for failing to consider the ramifications of improper execution are severe.<sup>141</sup>

Having identified the proper contracting party for the athlete is only half of the answer. Who contracts for the attorney-agent? If an attorney is a solo practitioner, this question is easily resolved. However, many attorneys practice in firms with fees for legal representation being paid to the firm. Since the firm receives the fees and probably establishes the parameter for fees and expenses charged to the Olympic athlete, the firm should be a party to the agreement.<sup>142</sup>

As a practical matter, the Olympic athlete should insist that the attorney-agent(s) actually providing the representation also be a party to the agreement. The attorney-athlete relationship is a personal one and the agreement should recognize the reliance and confidence being placed by the Olympic athlete on those selected to actually perform the services.<sup>143</sup>

## B. Identifying the Scope of the Representation

The representation agreement should clearly define the services to be provided by the attorney to the athlete.<sup>144</sup> These services

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between [Party 1] and [Party 2]."

139. If the Olympic athlete is a minor, he or she cannot lawfully be bound to a contract signed by them prior to their age of majority. The *Restatement of Contracts* Section 12, Capacity to Contract, provides that, "[n]o one can be bound by contract who has not legal capacity. . . ." RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981). The *Restatement of Contracts* also states, in Section 14, Infants, that, "[u]nless statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday." *Id.* at § 14.

140. These jurisdictions include California, Florida and New York.

141. The *Restatement of Contracts* Section 7, "Consequence of Avoidance," provides that, "[i]n some cases the party who avoids the contract is entitled to be restored to a position as good as that which he occupied immediately before the formation of the contract; in other cases the party may be left in the same condition as at the time of the avoidance." RESTATEMENT (SECOND) OF CONTRACTS § 7, cmt. c (1981).

142. MODEL RULES, *supra* note 63, Rule 1.5.

143. *Id.* Rule 1.15(c).

144. Failure to clearly define the scope of representation may result in a voidable contract by reason of misrepresentation or mistake. See RESTATEMENT (SECOND) OF CONTRACTS, §§ 151-53, 164, 167 (1981).

may range from the negotiation and documentation of a specific contract to the procurement of income producing opportunities.<sup>145</sup> The description of the services to be provided should not be general in nature. It could be disastrous for an attorney to agree to generally represent an athlete in all matters related to their Olympic career. For example, most attorneys are ill-equipped to handle the public relations aspects of an Olympic athlete.<sup>146</sup> The economics of a law firm do not favorably align with the time-consuming task of soliciting offers for an athlete and most athletes do not have the economic resources to pay for these services on an hourly basis.

The services provided by an attorney-agent are best limited to the following:

- i. providing advice regarding (but not actively soliciting) income producing opportunities offered to the athlete;
- ii. negotiating, documenting and closing contracts relating to such offers;
- iii. representing the athlete in disputes before the applicable NGB, the IOC or other regulatory bodies having jurisdiction over the athlete; and
- iv. assisting in the collection and enforcement of the athlete's contracts.

Firms with diverse expertise may also provide the athlete with tax planning advice including counseling in the areas of pension and profit sharing plans and estate planning. Any attorney lacking specific expertise in these areas should avoid agreeing to provide such services,<sup>147</sup> unless such advice is limited to assisting the athlete in selecting other professionals to provide these services.<sup>148</sup>

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145. Some typical services provided by agents for athletes include soliciting endorsement opportunities, media training, preparing press kits, negotiating deals and collecting payments.

146. While few athletes have continual exposure to the media, no one could have predicted the media frenzy that followed the Nancy Kerrigan-Tonya Harding incident. Margaret Carlson, *Now for the Skate-off*, TIME, Feb. 21, 1994, at 58; Duffy, *supra* note 44, at 67; Martha Duffy, *Why? It Hurts So Bad! Why Me?*, TIME, Jan. 17, 1994, at 44; Jill Smolowe, *The Slippery Saga of Tonya Harding*, TIME, Feb. 14, 1994, at 60.

147. See MODEL RULES, *supra* note 63, Rule 1.1.

148. See *id.* Rule 1.1. An attorney will often be called upon to offer assistance in the selection of other professionals. These selections may include accountants, bookkeepers, agents, media advisors, pension planners and others. Any attorney-agent aiding in these decisions should make sure that their client is well informed and given choices in making these decisions. The attorney-agent should beware of offering only one source of service.



### C. Providing for Special Circumstances

The representation agreement should clearly define the rights and responsibilities of each party thereto. It should describe the services to be performed and the method and timing for payments thereunder. The agreement should include a termination provision and restrict assignability by both parties. Its most important characteristics should be clarity and completeness.

#### 1. *Decision Making; Ability to Bind*

The representation agreement should clearly acknowledge that the attorney-agent is *not* authorized to make decisions for the Olympic athlete. The representation agreement should declare that the attorney-agent's lack of authority to make decisions for the Olympic athlete encompasses a lack of authority for the attorney-agent to bind the Olympic athlete to any contract.<sup>149</sup> This provision protects both parties from and against any misunderstanding, by requiring the Olympic athlete to make all final decisions and to sign all agreements. To the extent an Olympic athlete intends to protect his or her eligibility under the rules of the NCAA, the attorney-agent should take care to advise the athlete about any possible violation of those rules. Any decision regarding such eligibility must be made by the Olympic athlete.<sup>150</sup>

#### 2. *Handling the Athlete's Personal Finances*

The attorney-agent may agree to handle the personal finances of the Olympic athlete.<sup>151</sup> The cost to the Olympic athlete for an attorney-agent to handle his or her personal finances may outweigh

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149. A sample non-ability to bind provision would read, "All decisions regarding any contracts, offers, endorsements, appearances or any other opportunities for the benefit of the Athlete shall be made by the Athlete. In no event shall the Attorney have any authority to bind the Athlete."

150. Cf. Mike Fish, *The Selling of the Olympics: How Money Has Changed the Games*, ATLANTA J., July 12, 1992, at G15 (noting Anita Nall decided to forgo collegiate eligibility to cash in on stipends available to support her Olympic training); Chris Spolar, *Olympians Caught in Money Crunch*, WASH. POST, Aug. 28, 1988, at D1 (stating Wes Suter refused to accept anything other than room, board and airfare in order to protect his NCAA eligibility).

151. Some sample personal finance provisions that may be included in the representation agreement are:

- exercise diligent efforts to collect all monies due to the athlete;
- maintain accurate books and records of all monies due to the athlete;
- pay all bills and expenses of the athlete to the extent of monies received on behalf of the athlete;
- invest excess funds belonging to athlete in income producing accounts;
- and
- prepare all tax returns to be filed for the athlete.

the benefit. Unless this task can be assigned to a loyal and trustworthy assistant,<sup>152</sup> it is doubtful that an Olympic athlete can afford to pay an attorney for these services on an hourly rate. This is one area that an attorney-agent may choose to recommend another professional to provide the service.<sup>153</sup> If the attorney-agent is not responsible for the day to day finances of the athlete, the representation agreement should include instructions for the delivery of funds received by the attorney-agent on behalf of the Olympic athlete.<sup>154</sup>

### 3. *Exclusivity*

An Olympic athlete may request that the attorney-agent refrain from the representation of any other Olympic athlete competing in the same sport. Similarly, the attorney-agent may desire that he or she act as the exclusive representative of the Olympic athlete.<sup>155</sup> These types of exclusivity clauses should be included in the representation agreement.<sup>156</sup>

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152. This is an area where absolute confidentiality must be maintained. The obligation of confidentiality applies not only to the attorney, but also to those in his or her employ. See MODEL RULES, *supra* note 63, Rule 1.6.

153. Accounting firms, bookkeeping practices and investment advisors usually provide personal finance services.

154. A sample delivery of funds provision is as follows:  
 Promptly upon receipt of any funds belonging to the Athlete, the Attorney shall forward all such funds (if received in cash), checks, money orders or other forms of payment to \_\_\_\_\_ [the designated recipient] in accordance with the following instructions:

**FOR WIRING OF CASH**

Bank

ABA Number (for wiring)

Address (of Bank)

Attention: Responsible Person

For credit to Account No. \_\_\_\_\_

Telephone: \_\_\_\_\_

Telecopier: \_\_\_\_\_

**FOR MAILING CHECKS, MONEY ORDERS AND OTHER NON-CASH PAYMENTS**

[Designated Recipient]

Address

Telephone: \_\_\_\_\_

Telecopier: \_\_\_\_\_

The Attorney shall notify the Responsible Person or the Designated Recipient, as applicable, by telecopier of the pending delivery of any funds from the Attorney to the Responsible Person or the Designated Recipient, as applicable.

155. This is especially likely in a situation where the attorney-agent has agreed to a contingent fee arrangement for the Olympic athlete.

156. Sample exclusive representation provisions might read as follows:

#### 4. *Assignability*

Rights and obligations existing under a contract may be assigned unless precluded by contract.<sup>157</sup> The representation agreement should clearly preclude the right of either party to assign their respective rights and obligations thereunder.

#### 5. *Arbitration*

The representation agreement may provide a mechanism for handling disputes between the attorney-agent and the Olympic athlete. The most common form of dispute resolution provision is an arbitration clause.<sup>158</sup> Whether to include an arbitration provision is a difficult decision. Arbitration is generally a quicker and less costly method of dispute resolution. It is also a proceeding more likely to be swayed by the personal feelings and views of the arbitrators.

#### 6. *Choice of Law*

The selection of the state law governing the interpretation of the agreement is important. A court is not bound by a choice of governing law if the facts involved require the application of another state's laws.<sup>159</sup> Choice of law rules may require application of state laws which are not favorable to the terms of the agreement.<sup>160</sup>

#### 7. *Compensation*

The method of compensating the attorney-agent may vary depending upon the types of services the attorney has agreed to perform. Typically, attorney-agents are compensated at an hourly rate

- Attorney agrees that during the term of this Agreement he will not undertake to represent any other athlete competing in the sport of

- Attorney shall act as Athlete's exclusive agent in all matters relating to the marketing of Athlete's name, reputation, image and talents. Athlete agrees to direct all inquiries, offers and contacts directly to Attorney.

157. See RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(c) (1981).

158. A standard arbitration clause may read as follows:

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES (1990).

159. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (2) (1971).

160. For example, state statutory limitations on agent compensation or state requirements for guardianship proceedings when minors are parties to an agreement.

for the time spent on completing the task.<sup>161</sup> Alternative forms of compensation may be considered. Contingent fee arrangements have long been the method of compensating agents.<sup>162</sup> The Olympic athlete only pays in these arrangements if income is produced.<sup>163</sup> A contingent arrangement is permitted by the Rules,<sup>164</sup> but is only appropriate if the attorney-agent has agreed to procure income producing opportunities for the Olympic athlete.<sup>165</sup>

An attorney-agent may also agree to a combination fee arrangement by utilizing an hourly rate mechanism with an ultimate fee cap for a particular task. Fixed fees are slowly becoming a common denominator in the marketing of legal services. By fixing a cap the Olympic athlete has the assurance of knowing that the legal fees incurred will not exceed the agreed-upon amount.<sup>166</sup>

Compensation may also include reimbursement of expenses. Many law firms charge their clients for telephone calls, facsimiles, copying and other ancillary services. The representation agreement must state whether the expenses incurred by the attorney-agent are included or excluded from his or her fee. If specific expenses are to be charged separately, they should be specifically recited in the agreement.<sup>167</sup> Regardless of the method chosen for compensation, the attorney-agent's fee must be reasonable.<sup>168</sup>

161. If the hourly rate method is selected, the representation agreement should specify the hourly rate of each attorney and paraprofessional involved in handling the matter. The agreement should also indicate how and when bills will be generated for payment (monthly, quarterly or at conclusion).

162. Certain states and professional player associations limit the percentage fee to which an agent is entitled. For a listing of states implementing fee limits, see *supra* note 59. It is possible to include a sliding scale of compensation. For example, 10% for income up to \$100,000 (resulting in a \$10,000 commission), 12.5% for income from \$100,000.01 to \$250,000.00.

163. The Olympic athlete may desire to carve out pre-existing contracts and guaranteed income arrangements so that the attorney-agent is compensated only for that which he or she produced.

164. See MODEL RULES, *supra* note 63, Rule 1.5(c).

165. An attorney-agent agreeing to a contingent fee arrangement assumes the risk that income will be produced for the Olympic athlete. Before agreeing to a contingent fee, the attorney-agent should analyze the market to determine the likelihood of the Olympic athlete being marketable.

166. Danger exists in fixing a fee if the attorney-agent does not have adequate experience in providing the services requested. To fix a fee, the attorney-agent should estimate the amount of time he or she anticipates the job will take and multiply that time estimate by the appropriate hourly rates.

167. Most agents absorb all expenses incurred in connection with the representation of the athlete. Some of these expenses, such as travel expenses, can amount to considerable sums.

168. See MODEL RULES, *supra* note 63, Rule 1.5(a).

## 8. *Terminating the Representation Agreement*

The circumstances under which either party may terminate the representation agreement must be set forth in the agreement. The window of opportunity available to an Olympic athlete is usually short, and therefore a failed agency relationship may impact the ability of both parties to maximize their earnings realized from their relationship.

The agreement should be terminable by the Olympic athlete if the attorney-agent (a) breaches his or her duties under the agreement and fails to remedy that breach upon reasonable notice, (b) commits fraud, (c) dies, or (d) is no longer employed by the firm that is the party to the agreement.<sup>169</sup> It is important that the agreement not immediately terminate on the occurrence of any of these events.<sup>170</sup> The Olympic athlete should have the right to survey the situation and determine whether or not the agreement should terminate. Due to the innate conflict of interest, this decision should be made by the Olympic athlete with the assistance of independent counsel.<sup>171</sup>

The attorney-agent may desire to terminate the agreement if the Olympic athlete is no longer able to compete, whether due to injury or ineligibility. This is especially appropriate if the attorney-agent has agreed to procure opportunities for the Olympic athlete which no longer exist or if the agreement contains a provision preventing the attorney from representing other Olympic athletes in the same sport.

Due to the personal nature of this relationship, both parties should also have the right to end their relationship upon giving reasonable notice to the other party. A failed attorney-athlete relationship is an invitation to litigation and should be avoided at all cost.<sup>172</sup> Upon termination, the attorney-agent should be compensated for work completed and expenses incurred, if they are the responsibility of the Olympic athlete. If the attorney-agent is compensated on a percentage of income produced, he or she should be

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169. Termination on the death or termination of employment of a specific attorney-agent may not be appropriate if several attorneys are providing the services rendered to the client.

170. If the agreement is terminated automatically, all of its provisions are no longer in force. Therefore, if the attorney-agent continues to represent the Olympic athlete, he or she may not be entitled to receive the compensation set forth in the agreement.

171. MODEL RULES, *supra* note 63, Rule 1.8.

172. Specific performance is not an available remedy for the termination of a personal services contract. See RESTATEMENT (SECOND) OF CONTRACTS, § 367(1).

entitled to receive a post-termination percentage of any income contracted for by the Olympic athlete prior to the date of termination.<sup>173</sup>

## V. CONCLUSION

The representation of an Olympic athlete is an exciting yet danger filled exploit. To provide effective representation to an Olympic athlete, the attorney-agent must be cognizant of the laws of the applicable states, including the laws governing minors and agents, and the rules and regulations of the IOC, the USOC, the applicable NGB and its international affiliate, and the NCAA. Moreover, a general understanding of commercial endorsements, television contracts and media relations is crucial to the representation.

The inexperienced and ignorant attorney-agent may subject himself to a plethora of problems if he or she fails to understand the ramifications of his or her relationship with the Olympic athlete. Unlike representing a professional football or baseball player, there is no players' association with a strict set of rules and regulations to guide the attorney-agent in the representation of an Olympic athlete. Until the IOC, the USOC or the NGBs enact regulations legislating the representation of the Olympic athlete by third parties, the attorney-agent is left to fend for himself. Failure to heed the Rules and to identify, research and understand the myriad of issues endemic to such representation will almost certainly lead to a failed attorney-client relationship, possible disciplinary action and, at worst, disbarment.

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173. A suggested termination provision reads as follows:

Upon termination, the parties hereto will have no further obligations hereunder, except that Athlete agrees to pay to Attorney any and all commissions due to Attorney for 'agreements negotiated' by Attorney for Athlete's benefit prior to the date of termination. The term 'Agreements negotiated' shall include all agreements evidenced by a written contract executed by the Athlete or his or her representative and all agreements the material terms of which have been agreed to, whether verbally or in writing, among the appropriate parties.

